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No. 801

In the Supreme Court of the United States

OCTOBER TERM, 1950

PAUL MOSER, PETITIONER
v.
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 301

PAUL MOSER, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 56–60) is reported at 85 F. Supp. 683. The opinion of the Court of Appeals (R. 61–66) is reported at 182 F. 2d 734.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1950 (R. 67). The petition for a writ of certiorari was filed on September 11, 1950, and was granted on January 2, 1951 (R. 68). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The treaty of 1850 between Switzerland and the United States, provides, *inter alia,* that the citizens of one country residing in the other

shall be free from personal military service. Under Section 3 (a) of the Selective Training and Service Act of 1940, as amended, neutral aliens were exempted from military service upon application in accordance with the prescribed regulations. The Act further provided that such application thereafter debarred the applicant from United States citizenship. The questions presented are:

1. Whether petitioner, a Swiss national who obtained exemption from military service after applying for it on the prescribed Selective Service form, is debarred from becoming a citizen of the United States, as provided by the Selective Training and Service Act, or whether the treaty of 1850 precludes a denial of naturalization as the consequence of a claim to military exemption.

2. Whether, under the circumstances of this case, the Government was estopped from asserting petitioner's debarment from naturalization.

3. Whether the debarment from naturalization, incurred by claim of exemption from military service, was terminated by expiration of the effective period of the Selective Service Act.

STATUTE, REGULATION AND TREATY PROVISIONS INVOLVED

The Selective Training and Service Act of September 16, 1940, c. 720, 54 Stat. 885, *et seq.*, as amended by the Act of December 20, 1941, c. 602, §§ 2, 4–6, 55 Stat. 844, 845, the Act of

May 9, 1945, c. 112, § 1, 59 Stat. 166, the Act of May 14, 1946, c. 253, § 1, 60 Stat. 181, and the Act of June 29, 1946, c. 522, § 7, 60 Stat. 342, 50 U. S. C. App. 303 (a), 305 (a), 316 (a) and (b), provided in pertinent part as follows:

> SEC. 3 [50 U. S. C. App. 303]. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States [within specified age limits] shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.
>
> * * * * *
>
> SEC. 5 [50 U. S. C. App. 305]. (a) Commissioned officers, [various other similar groups] and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required

to be registered * * * and shall be relieved from liability for training and service * * *.

* * * * *

SEC. 16 [50 U. S. C. App. 316]. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) The provisions of the third sentence of section 3 (a) of this Act shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3 (b), 3 (c), 3 (d), 8 and 16 (b), and the fourth and fifth provisos of the second sentence of section 3 (a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date. * * *

Selective Service Regulation 622.43 (32 C. F. R. [1943 Cum. Supp] 622.43) provided in pertinent part:

§ 622.43 *Class* IV–C: *Neutral aliens requesting relief from training and service* * * *.

* * * * *

(b) When an alien registrant who is a citizen or subject of a neutral country (see

§ 601.2) at any time prior to his induction into the land or naval forces of the United States files with his local board an Application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in class IV–C. * * *

Articles I and II of the Convention of Friendship, Reciprocal Establishments, Commerce, &c., between the United States and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855 (11 Stat. 587–589), provide in pertinent part:

ARTICLE I

The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland, as well as the members of their families, subject to the constitutional and legal provisions aforesaid, and yielding obedience to the laws, regulations, and usages of the country wherein they reside, shall be at liberty to come, go, sojourn temporarily, domiciliate or establish themselves permanently, * * * to acquire, possess, and alienate therein property, (as is explained in Article V;) to manage their affairs; to exercise their pro-

fession, their industry and their commerce; to have establishments; to possess warehouses; to consign their products and their merchandise, and to sell them by wholesale or retail, either by themselves or by such brokers or other agents as they may think proper; they shall have free access to the tribunals * * *. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

The foregoing privileges, however, shall not extend to the exercize of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors.

ARTICLE II

The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.

No higher impost, under whatever name, shall be exacted from the citizens of one of the two countries, residing or established

in the other, than shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever to which the latter shall not be liable.

In case of war, or of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.

STATEMENT

The petitioner applied for United States citizenship under Section 310 (b) of the Nationality Act of 1940 (8 U. S. C. 710 (b)) (R. 7–12). At the hearing in the District Court for the Eastern District of New York on March 10 and June 9, 1949 (R. 41–55), the Immigration and Naturalization Service of the United States objected on the ground that petitioner was debarred from becoming a citizen of the United States by virtue of the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended, in that he had applied for exemption from military service during World War II as a neutral alien (R. 13, 41–42). The trial judge ordered petitioner admitted to citizenship (R. 2). On appeal to the Court of Appeals for the Second Circuit, the district court's order was reversed and the petition for naturalization dismissed (R. 67).

A. THE PETITIONER'S ATTEMPTS AT NATURALIZATION

The petitioner, a native and a national of Switzerland, first entered the United States as a nonimmigrant visitor on July 6, 1937, when 25 years of age (R. 9, 23–24). On December 25, 1937, he departed for Canada and was readmitted to the United States on December 29, 1937, as an immigrant for lawful permanent residence (R. 7, 20, 23–24). On March 9, 1938, he filed a declaration of intention to become a citizen (No. 411089), stating, *inter alia* (R. 18A), that the date of his entry into the United States was December 29, 1937, and that his occupation was that of civil engineer.

On May 11, 1940, petitioner left the United States for Switzerland for the purpose of rejoining his unit in the Swiss Army, in which he held a reserve commission (R. 20, 24, 56). He returned to this country in October 1940, reentering, according to the Court of Appeals (R. 61), as a nonquota immigrant returning to an unrelinquished domicile.[1]

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[1] Confirmation of the Court of Appeals' description of petitioner's re-entry is found in the fact that on the papers he filed in the various naturalization proceedings, his original entry was stated to have taken place, not in October 1940, but on December 29, 1937 (R. 9, 11, 51).

Petitioner seems at one time to have been told (R. 46) that his declaration of intention had lapsed because of his return to Switzerland in 1940, but the central office of the Immigration and Naturalization Service ruled otherwise (R. 51). See also note 3, p. 11, *infra*.

On October 19, 1940, petitioner married a United States citizen in the City of New York (R. 37). On October 30, 1940 (R. 38), he filed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization (No. 458512) (R. 23–24). In this form, he again stated that December 29, 1937, was the date of his arrival in the United States as an immigrant (R. 23). This form included the question, "If necessary are you willing to take up arms in defense of this country?", to which petitioner answered "Yes." It included the further question, "Did you claim exemption from the draft during the 2 World War because you were an alien?", to which petitioner answered, "No—not here" (R. 24).

About a year and a half later, on March 27, 1942, Moser filed a petition for naturalization (No. 330801). As the spouse of an American citizen, he was free, under the provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)) from the five year residence requirement (three being sufficient) and the requirement of a declaration of intention. He alleged, *inter alia,* entry into the United States on December 29, 1937, and continuous residence since that date (R. 3–4).

On February 5, 1943, during an interrogation by a naturalization examiner in connection with this petition for naturalization (No. 330801) filed in 1942 (R. 3–4), petitioner stated that when he left the United States in 1940, it was his full

intention to return. Consequently, the central office of the Immigration and Naturalization Service in Washington ruled that there was no break in the continuity of petitioner's residence in the United States and authorized the continuance of the petition for naturalization (R. 51).[2]

On June 5, 1944, petitioner was notified to appear with respect to his pending petition for naturalization. He was again notified on January 29, March 19, and April 30, 1945, but on each occasion he failed to be present (R. 6, 51.) Thereafter, on July 5, 1945, the petition for naturalization was dismissed by the court for "lack of prosecution" (R. 6, 11, 51).

On November 10, 1947, petitioner filed a second "Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization" in the United States District Court for the Eastern District of New York (R. 7). On March 31, 1948, he filed the petition for naturalization which gave rise to this case (N. 458512). He did so on the basis of his marriage to a citizen of the United States (R. 11), again obtaining the benefits of the provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)), including freedom from the requirement of a declaration of

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[2] It was between the foregoing date, February 5, 1943, and the date next mentioned, June 5, 1944, that petitioner, as will be seen, filed his claim for military exemption on February 26, 1944 (R. 14–15), the Swiss legation having decided that he was a nondeclarant (R. 31). See *infra*, pp. 16–19.

intention. At the time of this filing, he was given a preliminary naturalization examination in the course of which the examiner made a correction on the "Statement of Facts to be used in Making and Filing My Petition for Naturalization" (R. 9) by changing the date shown for his lawful entry for permanent residence in the United States from October 11, 1940, to December 29, 1937, the latter being the date of his entry as a quota immigrant (R. 9, 50).[3]

B. THE PETITIONER'S CLAIM TO MILITARY EXEMPTION

On October 19, 1940, petitioner registered under the Selective Training and Service Act of 1940. On January 15, 1941, he executed a Selective Service Questionnaire (DSS Form 40) (R. 33–40, 13), wherein he stated, *inter alia*, that he had filed a declaration of intention to become a citizen, in March 1938, and a petition for naturalization in October 1940 (R. 38). At this time, the liability for military service in the case of neutral aliens applied only to declarant aliens (54 Stat. 885). He requested classification in "Class III or IV" for the following reasons: "1. Expecting

[3] The continuity of Moser's residence for naturalization purposes was not broken by his absence from May 11, 1940, to October 11, 1940, as was evidenced by the fact that he was re-admitted as a nonquota immigrant (see *supra*, note 1, p. 8)—"an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad." Section 4 (b), Immigration Act of 1924; 8 U. S. C. 204 (b).

a child. 2. Citizen of Switzerland. 3. Approx. 2 years in the armed forces of Switzerland 1st Lieut. Engineers" (R. 39). On March 4, 1941, petitioner was classified Class III–A by his local draft board, a classification based on dependency (R. 40).

On December 20, 1941, the Selective Service Act was amended to subject nondeclarant neutral aliens to liability for military service (only declarants having theretofore been liable), and to provide the exemption for neutral aliens and debarment from citizenship in the event of application for such exemption, as set forth on p. 3, *supra*. On June 5, 1942, the Minister of Switzerland, in a letter to the Secretary of State (Petitioner's Br. 33–36), objected to the amendment on behalf of various Swiss nationals (the petitioner not yet being involved), as being contrary to "the text and the spirit" of the Treaty of 1850 and to "principles" of "international law," and requested the Secretary's intervention with the appropriate authorities on behalf of "at least the Swiss citizens who have not declared their intention to become American citizens", so that they might be "unconditionally exempted from the liability for military service." The letter of the Swiss Minister was acknowledged on July 6, 1942, in a letter signed by A. A. Berle, Jr. for the Secretary of State (Petitioner's Br. 36–37), assuring the Swiss Minister that it was not the intention of the Government to conscript Swiss nationals tem-

porarily in the United States, and closing with the statement:

> In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above [the treaty of 1850 and a 1937 convention relating to dual citizenship cases]. * * *

In the negotiations that followed, the Selective Service System refused to acknowledge a right to exemption on treaty grounds and restricted the exemption to that provided under Section 3 (a) of the Selective Training and Service Act. However, "In order that Swiss citizens might claim the exemption and reserve their position as to the effect of Section 3 (a) of the Selective Service Act on their right to become citizens, Form 301 [Application by Alien for Relief from Military Service] was revised * * *." The Swiss legation was "informed on numerous occasions by the Department [of State] that the effect of a claim to exemption from military service on the Swiss citizen's right to become an American citizen can only be determined definitely by the courts. * * *" (Appendix, *infra*, p. A20 [MS. Department of State, file 811.111 Lavanchy, from R. T. Yingling to Visa Division, Mar. 21, 1946]; Appendix, *infra*, pp.

A32–A33, A–35–A36, [Letters of Selective Service System, March 5, 1943, March 6, 1943]).

Form 301, revised March 16, 1943, and effective April 13, 1943 (8 F. R. 4819),[4] differed from the preceding form used in that there was deleted the statement that the application was made "under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941." Also deleted were the statement, "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States", and the provision for surrender by a declarant applicant of the triplicate copy of his declaration (R. 16–17). The revised form (R. 14–15), however, bore a printed *caveat* below the signature, as follows (R. 15):

> Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provides in part "That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by

[4] A revision dated January 2, 1943, and effective February 5, 1943 (8 F. R. 1709), was never used. (Appendix, *infra*, pp. A2, A6–A7 [Letter of Selective Service System, February 13, 1951].) See also Appendix, *infra*, p. A34.

> the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

A half year later, the Selective Service Regulations were amended (8 F. R. 13672, effective Oct. 1, 1943), deleting the former specific statement appearing in Sec. 622.43 (c) (32 C. F. R. [1941 Supp.] 622.43 (c)) that when a neutral alien files a Form 301 he is thereafter barred from becoming a citizen of the United States.[5]

On January 11, 1944, petitioner was reclassified into Class I–A as being available for military service (R. 40), in which classification he was continued on January 20, 1944, after a hearing, in which he stated that he desired to take an appeal (R. 40).

On January 24, 1944, petitioner advised the Consulate General of Switzerland at New York, by letter (R. 20), that he had been given a I–A classification by his local board and wished "to be reclassified and deferred from service in the armed forces of the United States as a neutral alien." He stated that he was an "Alien without first papers for American citizenship," and stated, further: "On March 27, 1942 I filed in Brooklyn Court for final citizenship. After a thorough examination of my papers, the citizenship was denied for the reason that when I left

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[5] For further details concerning the administrative practices summarized herein, see Appendix, *infra*, pp. A1, *et seq.*

for Switzerland 'without a re-entry permit' I lost all rights to my first papers." He stated that he had been informed by the "chief examiner" to file another application for naturalization but had taken no action. He asked whether he was to handle the appeal or whether the Swiss Legation would take up the matter. By letter dated January 25, 1944 (R. 21), petitioner furnished information to the Legation of Switzerland in Washington, to the effect that he had entered the United States with an "Immigration quota visa on October 11, 1940," and that since his 1940 entry he had "not obtained nor application filled out for 'first papers'."

On January 27, 1944, the Swiss Legation in Washington, in a letter to the Department of State, requested that petitioner as "a non-declarant Swiss citizen" be given an "unconditional release from the liability for military service in conformity with Article II of the Treaty of * * * 1850" (R. 31). The Department of State acknowledged the request and advised that it had been "referred to the appropriate agency of the Government for investigation" (R. 31–32). The Department of State forwarded the request to the Selective Service System (Appendix, *infra*, p. A57), which replied that the local draft board had been instructed to inform petitioner that he might obtain a revised form 301 from the Swiss Legation (Appendix, *infra*, p. A58).

On January 29, 1944, petitioner wrote to his local board, stating that he had taken the necessary steps with the Legation of Switzerland in Washington to be "released unconditionally" from liability for military service, "under the provisions of Article II" of the treaty and that he would "in due time execute before your Local Board 'Form 301 as amended'" (R. 30).

On February 3, 1944, the Consul General of Switzerland wrote to petitioner, referring to his "recent conversation regarding your application for unconditional release from the liability for military service" and informing petitioner that, in the opinion of the Swiss Legation, he "should be considered as a non-declarant Swiss alien," and that his application had been submitted to the Department of State for further action (R. 19).

The National Headquarters of the Selective Service System, on February 12, 1944, instructed the Director of Selective Service for the City of New York that petitioner, as a neutral alien, had claimed exemption from military service under the terms of the Swiss treaty and that he was entitled to file an application for exemption on either the "old Form 301 (16–26414–1)" or on a "revised Form 301 (16–33666–1)," either of which "may be used by the local boards in accordance with Section 622.43 of the Regulations" (R. 29). Six days later, the Legation of Switzerland informed petitioner, by letter (R. 30–31), that, in accordance with the terms of the Treaty

of 1850, it had requested the Department of State to exempt petitioner. The letter continued as follows:

> We are forwarding to you, herewith, two copies of DSS Form 301, *revised,* which kindly execute and file immediately with your Local Board. This action on your part is necessary in order to complete the exemption procedure; your Local Board, in accordance with Selective Service regulations, as amended, will then classify you in Class IV–C.
>
> Please note that, through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts.

The Secretary of State informed the Swiss Minister on February 25, 1944, that petitioner's local board had been instructed "to inform him that he may obtain from the Legation an Application by Alien for Relief from Military Service, DSS Form 301, which each such registrant is required to execute and file with his local board." (Appendix, *infra,* p. A59.)

On February 26, 1944, petitioner executed and filed the Form DSS 301, Revised, entitled, "Application by Alien for Relief from Military Service" (R. 14–15), in which he applied "for relief from liability for training and service in the land or naval forces of the United States," and stated,

"I have not declared my intention to become a citizen of the United States." The form, as heretofore noted (pp. 14–15), contained a footnote setting forth the statutory proviso that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." The Local Board thereupon placed petitioner in Class IV–C (R. 40, 41), in which exempt classification he remained for the remainder of the war and until reclassification as over-age on October 9, 1945, (R. 40, 41).

C. THE PROCEEDINGS IN THE COURTS BELOW

The petition for naturalization (No. 458512) came on for final hearing in the District Court on March 10 and June 9, 1949 (R. 41–55). The District Judge found that petitioner would have chosen military service if "he had been told that the Swiss treaty was superseded by the Selective Service Act and that he must face the choice either of serving in the Army or waive forever his right to become an American citizen * * *" (R. 55); he concluded that petitioner never waived his right to naturalization by signing DSS Form 301 (R. 55, 60). Consequently, the District Judge overruled the Government's objections to Moser's petition for naturalization; and on July 21, 1949, entered an order admitting him to citizenship (R. 2). This order was reversed upon appeal to the Court of Appeals for the Second Circuit (R. 67) upon the grounds, in substance,

that the treaty was silent as to acquisition of citizenship by nationals of either country, that the Congressional provision for debarment accordingly was not in contravention of the treaty, that the language of the Selective Training and Service Act was not limited to non-treaty aliens, and that (without deciding whether estoppel would be effective as a matter of law) no factual basis for estoppel had been established in the limited actions and statements of the government agencies (R. 61–66).

SUMMARY OF ARGUMENT

Two questions are discussed by way of introduction to the argument. It is pointed out that while not necessarily relevant to the questions presented for decision, the petitioner was literally a "declarant" alien when he sought military exemption, and certainly was a "declarant" in all but the most technical sense since he had a petition for naturalization pending at the time.

The suggestion is then made that since the treaty of 1850 and the Selective Training and Service Act of 1940, as amended, are plainly not in conflict, it is unnecessary to reach the delicate and far-reaching questions that would arise if there were a conflict.

I

A. The text of the treaty of 1850 between the United States and Switzerland, grants a right

ice in the other. It does not deal with the right of nationals of either country to become citizens of the other. The attaching of a debarment from citizenship as a consequence of exercising the exemption does not render the right to be free from military service nugatory, nor does it infringe on any rights granted by the treaty. The treaty specifically, and, in terms, excepts "political rights" from its catalogue of rights conferred. That specific exception and the saving, by the treaty, of Federal "Constitutional" provisions, requires the conclusion that the signatories did not intend to intrude in any way on the constitutional power of Congress to prescribe qualifications for American citizenship.

B. The history of the debarment provision in the Selective Training and Service Act of 1940, as amended, makes it clear that debarment from citizenship was early conceived of not as a penalty attached to a claim of military exemption but, rather, as the result of a Congressional conviction that resident aliens who chose not to serve had demonstrated a lack of attachment to this nation warranting denial of the privilege of naturalization.

From the Civil War to the present, Congress and the executive branch of our Government have shared the conviction that treaties like those here involved do not preclude debarment from citizenship as a consequence of a claim by a resident alien to military exemption. The problem of asserted conflict was squarely faced by the Congress,

in 1918, and the view clearly expressed that the question of eligibility for naturalization was outside the scope of such treaties. This view was again taken in 1941, and later, by the President, The Selective Service System, and the Department of State, and acted upon by the Congress in enacting the statutory provision here in question.

II

Since the Selective Training and Service Act of 1940, as amended, requires that a claim of a neutral alien to military exemption be honored, and that is all that the treaty of 1850 requires, the statutory provision for debarment from citizenship is not in derogation of any right conferred by the treaty, and it need not be construed as inapplicable to treaty aliens in order to bring the statute and treaty into accord.

Moreover, Section 3 (a) of the Selective Training and Service Act of 1940, as amended, does not in terms exclude treaty aliens from its debarment provisions, nor can its language be ignored and such an exclusion inferred.

A. The debarment provisions in the various selective service laws were enacted pursuant to this Government's desire to bring its conscription laws into line with treaties like that of 1850 and to remove conflicts with conventional as well as customary international law that had arisen as a result of earlier provisions of law unconditionally drafting aliens, even those freed under treaty provisions from the duty to serve. Hence such

statutory provisions cannot be read as inapplicable to those, like petitioner, in recognition of whose rights they were enacted.

B. Since the treaty right to be free from military service is in part declaratory of much the same right of neutral aliens under the law of nations, construction of Section 3 (a) to make its debarment provision inapplicable to those having a pre-existing right to freedom from military service would tend to nullify that provision entirely. Such a consequence is, of course, to be shunned.

III

Petitioner's invocation of a unique doctrine of "citizenship by estoppel" must be rejected not only because there is no legal warrant for it but also because the facts in this case in any event afford no basis for an estoppel. Petitioner's hope that his claim to exemption would not lead to debarment from citizenship was his own; neither the Selective Service System, nor the State Department, nor even the Swiss Consulate gave him any assurance that the consequence of debarment could be avoided. He was advised merely that the matter could be finally resolved only by the courts.

The finding of the district court in this case that petitioner would have chosen military service if he had known that a claim to exemption would result in his debarment from citizenship can no more help petitioner than did a similar finding

aid the petitioner in *Savorgnan* v. *United States*, 338 U. S. 491. Petitioner is bound by the legal consequence of the claim to exemption which he knowingly made.

IV

The termination of the effective period of the Selective Service Act of 1940, on March 31, 1947, did not result in removal of the debarment from citizenship from those who had theretofore claimed military exemption. The Act provided that those who sought exemption should be debarred "thereafter." It could scarcely have been the purpose of Congress to work a debarment only while the war lasted, and thus permit aliens simply to postpone naturalization until application for citizenship could be safely made. The history of the Act, the subsequent incorporation of the debarment in the 1945 amendment to the permanent Immigration Act of 1924, and the saving provisions of 1 U. S. C., Supp. III, 109, evince a clear Congressional purpose that the debarment should continue unless and until it is specifically removed by Act of Congress.

ARGUMENT

Introduction.—Two aspects of this case should be discussed at the outset because while they bear on the issues involved and recurrently suggest themselves in various phases of the Argument, they are probably collateral in the sense that they

are not necessarily presented for decision in this case.

A. *The question whether petitioner was a "declarant" alien when he applied for military exemption.*—As has been briefly noted (*supra*, p. 12) and as the Argument will show in more detail, Congress has, in the various "draft" laws enacted since 1860, often distinguished between "declarant" and "non-declarant" aliens. But neither the treaty of 1850 with which we are here concerned nor the applicable statutory provision (Section 3 (a) of the Selective Training and Service Act in the version here applicable and set out *supra*, p. 3) distinguishes between "declarant" and "non-declarant" aliens.

The Government is consequently of the view that the question of petitioner's status in this respect is probably irrelevant to this case. But since that distinction has been drawn so often in the field with which we are concerned, and may conceivably be deemed relevant, it is desirable to make clear and explicit the Government's position that petitioner was a "declarant" when, on February 26, 1944 (R. 14–15), he filed his application for relief from military service.

It is not suggested that when, on January 24, 1944, petitioner advised the Consulate General of Switzerland, by letter, that he was an "Alien without first papers for American citizenship" (R. 20–21) he was guilty of a purposeful misrepresentation. See R. 52–53, 58, 63. But from the

facts appearing in the Statement, *supra*, pp. 8–11, the Government believes it to be clear that petitioner was in fact a declarant alien, having filed a "Declaration of Intention" on March 9, 1938 (R. 18A), which was deemed to be effective by the central office of the Immigration and Naturalization Service (R. 51) notwithstanding petitioner's return to Switzerland in 1940 (R. 20, 24, 56).[6]

In any event, only the most technical reading of the term "declarant" could convert petitioner into a "non-declarant". For, whatever the formal status of his "Declaration of Intention", he was, beginning on March 27, 1942 (R. 3–4), a petitioner for naturalization, and that petition was not dismissed until July 5, 1945 (R. 6, 11, 51), more than a year after he claimed military exemption (R. 14–15).

B. *The question whether, if the Selective Training and Service Act of 1940 be read as in conflict*

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[6] The petition for naturalization, filed by Moser on March 27, 1942 (R. 3–4), and ultimately dismissed for "lack of prosecution" (R. 6, 11, 51), could only have been processed on the assumption that his declaration of intention had not been invalidated by his return to Switzerland. For while, as the spouse of an American citizen, the declaration could be dispensed with under 8 U. S. C. 710 (b), a showing of three years' continued residence "immediately preceding the filing of the petition" was still required. And that residence requirement could not be fulfilled in 1942 if there had been deemed to be a break in the continuity of his residence between May and October 1940, while he was in Switzerland. See also notes 1 and 3, *supra*, pp. 8, 11.

with the treaty of 1850, the later statute overrides the earlier treaty.—There can be no doubt of the Constitutional power of the Chief Executive or the Congress to formulate a national policy or enact legislation inconsistent, in whole or in part, with the enforcement of a treaty. *Clark* v. *Allen,* 331 U. S. 503, 508–509; *Pigeon River Co.* v. *Cox,* 291 U. S. 138, 160; *Whitney* v. *Robertson,* 124 U. S. 190; *Head Money Cases,* 112 U. S. 580; *Cherokee Tobacco,* 11 Wall. 616, 621. And when such inconsistent legislation is enacted, it is the duty of the courts to follow the Congressional mandate, leaving the question of treaty status to international negotiation between the interested states. See *Botiller* v. *Dominguez,* 130 U. S. 238, 247.

However, as stated for this Court by Mr. Justice Brandeis in *Cook* v. *United States,* 288 U. S. 102, 120: "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." See also *Chew Heong* v. *United States,* 112 U. S. 536; *United States* v. *Payne,* 264 U. S. 446; *Cheung Sum Shee* v. *Nagle,* 268 U. S. 336; 5 Hackworth, *Digest of International Law,* Sec. 489; 2 Hyde, *International Law,* p. 1464. And the cogency of this doctrine, thus frequently asserted and applied in the past, has increased in recent years.

The concern and participation of the United States in world affairs has grown notably, particularly since World War II. This has been especially true in the field of multilateral treaties and public international organizations. There has, of course, been no diminution but rather an increase in the bilateral treaty and international agreement relationships between the United States and other countries. A truly striking development in American foreign relations, however, has occurred through United States participation in the United Nations and other international organizations. This development reflects the recognition of greatly increased interdependence among nations, and their need to engage in close and working cooperation on many matters which have become international in significance and are now so recognized.

This cooperation, formally based on treaties and other international agreements, is expressed in the work of the organs of the United Nations, of its numerous "specialized agencies", and of other international organizations in which the United States participates. Action by the United States which has the effect of modifying or abrogating, unilaterally, these relationships and arrangements is of far-reaching importance and a matter of considerable national as well as international concern. Since in the great majority of instances the Congress (through appropriations legislation and the approval of

international agreements by joint resolution—or the Senate through treaty ratification) has participated in entering upon and implementing these international relationships and arrangements, Congressional modification or abrogation of them should not be held to take place in the absence of a clearly expressed purpose of Congress to do so.

It is submitted that the Congress, in considering new legislation is aware of the international obligations of the United States and certainly should not be presumed to act without scrupulous regard for them. In some cases, of course, the Congress may determine that new legislation should, in one or more respects, override the law of the land embodied in existing international obligations. It is to be expected in such cases that careful consideration would be given to the conflict in question, and that a decision would be reached after a careful canvass of the factors involved. Such a process of legislative consideration would leave behind clear evidence of the Congressional purpose—available for use in subsequent construction of the new legislation. But where such consideration does not take place, or where no Congressional purpose to modify or abrogate emerges and is clearly expressed, it is submitted that the courts should not hold that a prior international obligation is modified or abrogated by a subsequent Congressional enactment.

Thus the question, whether if there were a con-

flict between Section 3 (a) of the Selective Service Act and the treaty of 1850, the later act would supersede the earlier treaty, as the court below indicated in passing (R. 65), is an extremely delicate and difficult one, and every effort should be made to avoid it. Since we are convinced that there is no conflict between the statute and the treaty, we do not believe that any questions which which arise only if a conflict be assumed are presented in this case. And we shall now proceed to set out the materials from which the conclusion that there is no conflict is, we submit, compelled.

I

THE TREATY OF 1850 BETWEEN THE UNITED STATES AND SWITZERLAND DOES NOT PRECLUDE DEBARMENT FROM CITIZENSHIP AS A CONSEQUENCE OF A CLAIM TO EXEMPTION FROM MILITARY SERVICE

A. THE TEXT OF THE TREATY REVEALS THAT THE SIGNATORY NATIONS WERE NOT CONCERNED WITH NATURALIZATION OF THEIR NATIONALS

The treaty here in question, concluded on November 25, 1850, and proclaimed on November 9, 1855,[7] provides in its Article II that:

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but

[7] 11 Stat. 587, 595. During the intervening time further negotiations resulted in certain modifications of provisions concerning real estate and other matters not pertinent to the questions here involved. 5 Miller, *Treaties and Other International Acts of the United States*, 876–898, 900–904.

> they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.[8]
>
> * * * * *

On its face, and with but one exception to be shortly discussed, this provision reflects no concern whatever with the consequences that might be attached to the freedom from military service that is guaranteed. It is to be assumed, of course, that the signatory powers did not contemplate conditions on exemption from military service which would render that grant nugatory. Thus, if the consequence of a claim to military exemption were, to suggest an extreme case, the imposition of the death sentence on the claimant,

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[8] The United States has similar treaties, containing reciprocal military exemption provisions (in addition to that with Switzerland), as follows: Argentina (10 Stat. 1005, 1009), China (63 Stat. Pt. II), Costa Rica (10 Stat. 916, 921), Ireland (Dept. of State Treaties and Other Int'l Acts Series, 2155), Italy (63 Stat. Pt. II), Paraguay (12 Stat. 1091, 1096), Thailand (53 Stat. 1731, 1732), Spain (33 Stat. 2105, 2108), and Yugoslavia (22 Stat. 963, 964). The treaties with China, Ireland, and Italy were concluded after enactment of the Selective Training and Service Act of 1940. In addition, the United States has treaties with Honduras (45 Stat. 2618, 2622), El Salvador (46 Stat. 2817, 2821), Norway (47 Stat. 2135, 2139), Estonia (44 Stat. 2379, 2381), Germany (44 Stat. 2132), Hungary (44 Stat. 2441, 2445), Latvia (45 Stat. 2641, 2643), Liberia (54 Stat. 1739, 1742), and Austria (47 Stat. 1876, 1880), providing for the drafting, in the event of war, of declarant aliens remaining in residence in the other country.

the right to be free from military service would be converted into no right at all.

But short of such measures, and in the absence of any contemporary collateral record warranting the implication of a right to citizenship in the nation in which military service is refused (see 5 Miller, *Treaties and other International Acts of the United States*, pp. 845–904; and see R. 64), the text of the treaty as a whole must be examined and the question considered whether debarment from citizenship as a consequence of military exemption is precluded.

The underlying materials which are available make it clear that Article II of the treaty, with which we are particularly concerned, "is only a development and an application of the principle of equality set forth at the head of the treaty * * *",[9] *i. e.* in Article I. Article I contains, in the main, an extensive listing of reciprocal rights of aliens to "sojourn temporarily, domiciliate or establish themselves permanently", to manage their affairs, exercise their profession, and the like. And so, it may be assumed again, that denial of any such specifically granted rights as a consequence of freedom from

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[9] The excerpt above quoted is from the message of the Swiss Federal Council of the Confederation to the Federal Assembly, December 3, 1850, and the views there expressed reflected as well those of the Special Agent of the United States who negotiated the original Convention. See 5 Miller, *Treaties and other International Acts of the United States*, pp. 867, 864. And see note 12 *infra*, pp. 36–37.

military service would be in contravention of the treaty.

But the treaty confers no right to naturalization. Indeed, Article I goes on specifically to provide (11 Stat. 587, 588) that:

> The foregoing privileges, however, *shall not extend to the exercise of political rights,* nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors. [Italics supplied.]

This denial of "political rights", which would probably be properly implied even if it were not made express,[10] certainly is in the face of petitioner's present assertion that the treaty of 1850 takes from its signatory powers the right to deny the "political right" of citizenship to those aliens who refuse military service. Cf. Bouchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 64–65.

Confirmation for this conclusion appears in another provision of Article I of the treaty of 1850—that which provides for the admission and treatment of the citizens of the signatory powers

[10] Secretary of State Daniel Webster wrote to the President, on January 21, 1851: "This 1st article is essentially the same as the 1st article in the Convention now subsisting between the United States and the Swiss Confederation, concluded in May 1847 * * *." 5 Miller, *op. cit.*, p. 879. However, the 1847 convention did not contain the quoted reservation with respect to political rights. 5 Miller, *op. cit.*, pp. 169–170.

> upon a footing of reciprocal equality in the two countries, *where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties.* [Italics supplied.]

By its plain terms, this provision brings into play Section 8, Article I of our Constitution, which gives to Congress the power "To establish a uniform Rule of Naturalization". That power, it is well settled, is a plenary one; the qualifications for citizenship are for Congress to prescribe; it can condition the offer of the privilege as it sees fit. *Maney* v. *United States,* 278 U. S. 17, 22; *Zartarian* v. *Billings,* 204 U. S. 170, 175; *United States* v. *Ginsberg,* 243 U. S. 472, 475; *Luria* v. *United States,* 231 U. S. 9, 23. In the light of the absence in the treaty of anything specifically foreclosing debarment from citizenship as a consequence of a claim to military exemption and its express saving of "constitutional * * * provisions", the treaty should not be read as a constraint on Congress to make exceptions to its long-standing conviction that one who, like petitioner (R. 3–4), desired citizenship in a free republic must be prepared if need be to fight in defense of his country's freedom. See *infra,* pp. 41, 50–57, 70. And cf. *United States* v. *Schwimmer,* 279 U. S. 644; *United States* v. *Macintosh,* 283 U. S. 605; compare *Girouard* v. *United States,* 328 U. S. 61, with Section 29 of the Internal Security Act of 1950, Pub. L. No. 831, 81st Cong.,

2d Sess. Any discrimination worked by debarring from citizenship neutral aliens claiming military exemption is, if anything, to their advantage. For, under the Selective Training and Service Act of 1940, as amended, citizens, nationals of cobelligerent nations, enemy aliens, and neutral aliens not claiming exemption, all may be compelled to serve, the sole alternative being criminal punishment. See 50 U. S. C. App. 303 (a) and Fourth Report of the Director of Selective Service (1948) pp. 206–209. Neutral aliens who, like petitioner, claimed exemption lost nothing but their right to be citizens of the nation they chose not to serve.[11]

The only reference in the treaty of 1850 to consequences that might be attached to freedom from

[11] The provision of a Swiss criminal statute (Article 94, Swiss Military Criminal Code, June 13, 1927; Nouveau Manuel du Droit Suisse, Zurich, 1946–1947, vol. 2, p. 632), cited in the Petitioner's brief (p. 5, note 1) to the effect that any Swiss citizen "who, without the permission of the Federal Council enters foreign military service shall be punished by imprisonment," is not relevant to the issue involved herein. Switzerland is one of the countries which recognizes dual citizenship (MS Dept. of State, file 354.117 Kienast, Ernest 4/51/68, 3 Hackworth, *Dig. of International Law*, pp. 366–367), and a Swiss citizen can never divest himself of such citizenship even if naturalized in another country. Consequently, the Swiss criminal statute would proscribe a Swiss citizen from service in the United States armed forces even after he had acquired United States citizenship. Nevertheless, there is no doubt that the possibility of such a consequence could not operate to relieve from service in our armed forces, in time of war, a Swiss national, otherwise qualified, who had already acquired United States citizenship. See Appendix, *infra*, pp. A54–A55.

military service is the provision, in Article II (*supra*, p. 6) that nationals of one power, exempted by the other, should remain liable "to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service." There is no suggestion that such liability was the sole consequence to be attached to military exemption; it appears, rather, that aliens excused from service were specifically expected, for example, to pay general war taxes,[12] from which those who claimed no exemption were, in fact, relieved in whole or in part. See, *e. g.*, Internal Revenue Code, Sec. 22 (b) (13), 26 U. S. C. 22 (b) (13).

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[12] The following appears in the message of the Federal Council of the Confederation to the Federal Assembly, December 3, 1850 (5 Miller, *op. cit.* 867):

"Article 2 regulates that which concerns taxes and various contributions * * *.

Article 2 is only a development and an application of the principle of equality set forth at the head of the treaty * * *; but as other consequences of the principle were brought out, it was not possible to pass over in silence so essential a point as that of the taxes * * *.

Furthermore, the difficulties which some Cantons have had with France and Sardinia on the subject of pecuniary contributions required in compensation for exemption from personal military service have rendered perceptible the necessity of a categorical explanation by stipulating [here is quoted the opening paragraph of the article]. This explanation is all the more proper because compensations of that kind are not known in the United States of America.

"It is understood that those contributions will not dispense the citizens of one of the two countries residing or estab-

The provision just referred to demonstrates, as well, that the exemption from military service was intended to be a strictly limited right in that it carried with it no immunity from the pecuniary contributions levied on exemptions from military service. It is likely that "pecuniary or material contributions" as a consequence of military exemption was specifically included partly because it was a then familiar consequence; but the treaty is not to be read statically to preclude consequences, like debarment from citizenship, which, in our generation, are more common. See, *e. g.*, Canada, Appendix, *infra*, p. A56. See Privy Council Order 8343, Sept. 16, 1942. And cf. Treaty of Friendship, Commerce and Reciprocal Establishments between Great Britain and Switzerland, 1855, Article V.

Finally, it is clear from the history of the treaty that this liability for contributions in lieu of military service was specifically mentioned in Article II, because taxation was the principal subject mat-

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lished in the other from paying the general war contributions which might be levied on the citizens of the country where they reside, without distinction between those who are exempted from personal military service and those who are held to it; they shall be subject thereto as well as to all other taxes required from citizens of the country themselves. This appears from the wording of the article, and such is the intention of the parties."

The Special Agent of the United States who negotiated the original Convention apparently concurred in this discussion, for he referred to the report of the Federal Council as follows (Dec. 26, 1850, quoted in 5 Miller, *op. cit.* 864): "This paper, as you will have perceived, gives a lengthened history of the negotiations and explains minutely the object of the various stipulations contracted between the two Republics."

ter of that Article and for that reason was given particular attention. See note 12, *supra*, pp. 36–37. Inclusion of a specific liability to make contribution in lieu of military service was evidently for the purpose, as the court below pointed out (R. 64), of preventing "discrimination against citizens and, we think, cannot be treated as an agreement that treaty nationals would be relieved from military service without affecting their status in other respects at all."

B. CONGRESS AND THE EXECUTIVE BRANCH HAVE CONSIDERED DEBARMENT FROM CITIZENSHIP TO BE CONSISTENT WITH THE RIGHT OF AN ALIEN TO BE FREE FROM MILITARY SERVICE

1. *The period between 1862 and 1898.*—During this period, which began only seven years after the proclamation of the Treaty here involved, the question of immunity from service was complicated by provisions in the laws of some of the states of the United States according various rights, including suffrage, to declarant aliens prior to full naturalization. And so, when the Act of July 17, 1862, c. 201, 12 Stat. 597, authorized the President to adopt regulations necessary to execute the draft of the militia,[13] while providing that "the enrolment of the militia shall in

[13] The Act of July 17, 1862, c. 201 (12 Stat. 597), amended the Act of Feb. 28, 1795, c. 36, 1 Stat. 424, to include the following:

"* * * If by reason of defects in existing laws, or in the execution of them, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this act into execution, the President is authorized in such cases to make all necessary rules and regulations; and the enrolment of the militia shall in all cases include all able-bodied male citizens * * *."

all cases include all able-bodied male citizens", the War Department ruled that declarant aliens who had voted should be liable to the draft. And the Secretary of State published a letter stating that representatives of other powers would not complain in such cases.[14] On September 5, 1862, Secretary of State Seward wrote (4 Moore, *Digest of International Law* 53–54):

> There is no principle more distinctly and clearly settled in the law of nations, than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly claimed and insisted upon it in our intercourse with foreign nations. While the State of Indiana holds that an alien becomes a citizen by one year's residence and declaration of intention to become a citizen of the United States, the law of Great Britain holds that a native British subject owes allegiance to the British Government, until he has completely effected his naturalization in the United States, under the laws of Congress.
>
> In the very beginning of the war, the question arose between the two Governments in this way. A British subject residing in Maryland, who had filed a declaration of intention, but had not per-

[14] The foregoing is taken from the summary by Senator Doolittle, Feb. 16, 1863 (62 Cong. Globe 991). And note the reference to an incident in Pennsylvania where marshals watched the voting upon "the pretended fear" that aliens who had not been naturalized might vote without having been enrolled for the draft. 62 Cong. Globe 1217.

> fected his naturalization under the laws of Congress, claimed protection and redress from this Government on the ground that he had a British passport. * * * It is proper to state, however, that in every case where an alien has exercised suffrage in the United States, he is regarded as having forfeited his allegiance to his native sovereign, and he is in consequence of that act like any citizen liable to perform military service. It is understood, moreover, that foreign governments acquiesce in this construction of the law. It is hoped that under this construction your militia force will not be sensibly reduced.

This view was to play an important part in the subsequent conscription legislation. When this legislation was first considered in the Committee of the Whole (Feb. 16, 1863; 62 Cong. Globe 976–997), the Senate rejected an amendment to subject declarant citizens who had voted to compulsory service. 62 Cong. Globe 991. The amendment was opposed on the ground that declarants were still subjects of foreign powers. Practical considerations as to possible involvements with other powers were also raised. Supporters of the amendment asserted, however, that foreign powers seemed unwilling to intervene against drafting of declarants who had voted; that a declaration of intention and exercise of suffrage constituted a waiver, at the least, of the alien's rights to object, and that if a foreign government chose to object, a discharge could be

granted, as had even been done in certain cases of volunteers. 62 Cong. Globe 991–993.

It was in this discussion that an early suggestion of debarment from citizenship as a consequence of military exemption appears. Senator Doolittle stated that a declarant appearing before a naturalization court, who had voted in elections and resided in the United States for five years but who had pleaded exemption as an alien, "is not proving that he is a good citizen and attached to the Constitution." 62 Cong. Globe 993.[15]

When the bill was reported out to the Senate (62 Cong. Globe 997–1002), the amendment providing for the drafting of declarant aliens was again offered and was not restricted to those who had voted.[16] Substantially the same contentions

[15] The contention is not here cited as a correct statement of the law in the absence of a specific enactment, but as an early illustration of the thinking which later developed into a legislative debarment of those who availed themselves of their right to exemption from military service; a criterion of citizenship seems contemplated in this discussion rather than a compulsion to serve.

[16] The restriction of the provision to only those declarants who had voted was omitted because "it makes an exception in favor of those who have not exercised the privilege of voting." 62 Cong. Globe 1001. By the Proclamation of May 8, 1863 (see *infra*, p. 43) liability for military service was retained as to voting declarants even if they were no longer found within the United States.

The eventual specific language of the Act of March 3, 1863, on this point was as follows (12 Stat. 731): "That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens * * * are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose. * * *"

were voiced and the drafting of declarant aliens was again urged (this time by Senator Cowan) as "the very best mode of testing them during the three years of probation * * *." The drafting of all declarant aliens was, upon final vote, provided in the Senate bill. 62 Cong. Globe 1001.

When the Senate bill came before the House of Representatives, an amendment was offered at the outset of the deliberations (February 23, 1863, 62 Cong. Globe 1214) providing that only "citizens" should be enrolled. Objection was voiced to the lawfulness of drafting aliens, and was countered with the suggestion that no aliens would thereby be required to "fight against their own sovereigns." 62 Cong. Globe 1223. Two days later, a substitute bill was offered, likewise limited to "citizens." The substitute was defeated without specific attention to any particular aspect, including the question concerning aliens. 62 Cong. Globe 1292–1293. We do not find further discussion concerning the liability of aliens in the extensive debates in the House, but when the bill, amended in other respects, was returned to the Senate, two Senators protested, in the very last comments before passage of the bill, that a declarant does not yet owe allegiance, that he may perhaps never become a citizen, that he might be conscripted to serve against his own country, and that difficulties with other countries might result. Without further answer to these protests,

the bill was passed (62 Cong. Globe 1390–1391) and became law on March 3, 1863 (12 Stat. 731).

On May 8, 1863, the President issued a proclamation (13 Stat. 732) stating that declarant aliens who had not voted or exercised any other political franchise had claimed the right "under treaties or the law of nations" to renounce their purpose to become citizens. The proclamation provided that no plea of alienage would be allowed in the case of any declarant alien who should be found within the United States after 65 days from the date of the proclamation or in the case of any declarant alien who had voted or exercised any other political franchise.[17]

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[17] The text of the portions of the proclamation containing the statement concerning the aliens and the rule applied to them, was as follows:

"*Whereas*, It is claimed by and in behalf of persons of foreign birth within the ages specified in said act who have heretofore declared on oath their intentions to become citizens under and in pursuance of the laws of the United States, and who have not exercised the right of suffrage or any other political franchise under the laws of the United States, or of any of the states thereof, that they are not absolutely concluded by their aforesaid declaration of intention from renouncing their purpose to become citizens, and that, on the contrary, such persons under treaties or the law of nations retain a right to renounce that purpose and to forego the privileges of citizenship and residence within the United States under the obligations imposed by the aforesaid act of congress:

"Now, therefore, to avoid all misapprehensions concerning the liability of persons concerned to perform the service required by such enactment, and to give it full effect, I do

It is to be observed that this legislation and proclamation sought to compel declarant aliens to render military service if they had voted, even though they might leave the country in 65 days, and it possibly contravened the treaty with Switzerland in prohibiting residence in the United States by declarant aliens except upon the condition of military service. The provisions concerning residence were specifically set forth in the treaty, as distinguished from the complete silence concerning any right to naturalization. But no objection on behalf of Swiss aliens appears in Moore's Digest for this period, and while some protests were made with respect to British and French declarant aliens who had voted, these protests were not pressed by their respective governments. 4 Moore, *op. cit.* 54–56. It may be, however, that some protests of this kind were honored, in light of the later statement of Secretary

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hereby order and proclaim that no plea of alienage will be received or allowed to exempt from the obligations imposed by the aforesaid act of congress, any person of foreign birth who shall have declared on oath his intention to become a citizen of the United States under the laws thereof, and who shall be found within the United States at any time during the continuance of the present insurrection and rebellion, at or after the expiration of the period of sixty-five days from the date of this Proclamation, nor shall any such plea of alienage be allowed in favor of any such person who has so, as aforesaid, declared his intention to become a citizen of the United States, and shall have exercised at any time the right of suffrage, or any other political franchise, within the United States, under the laws thereof, or under the laws of any of the several states." 13 Stat. 732.

of State Bayard that, "there is not a single instance in which an alien was held to military duty when his Government called for his release." 4 Moore, *op. cit.* 55.[18]

This period, in summary, reveals a very early form of the concept of disqualification from citizenship of aliens who availed themselves of their exemption from military service. That principle was not in fact applied, because of the then requirement that declarant aliens must serve. But there was enunciated a criterion of naturalization, clearly distinguishable from any attempt to reduce or circumvent the exemption itself.

2. *The period from 1898 to the Selective Draft Act of May, 1917.*—In the draft laws of April 22, 1898, and May 18, 1917 (30 Stat. 361; 40 Stat. 76, 78), declarant aliens were again made liable to the draft, in language substantially identical with that of the legislation of March 3, 1863,[19] and without the avenue of escape provided by the proclama-

[18] In accord with this record as to releases, see statement of Secretary of State Blaine in 1880, 4 Moore, *op. cit.* 60–61. *Contra*, as to a few cases in which British aliens had voted, see statement of Assistant Secretary of State Davis in 1873, 4 Moore, *op. cit.* 58.

[19] In the 1917 legislation, the words "male persons not alien enemies" were employed instead of "persons of foreign birth."

tion of May 8, 1863. It was afterward admitted that the 1917 enactment violated the rights of aliens, and that neither the State Department, the War Department, nor the Committee on Foreign Affairs had directed attention to the fact of such violation when the bill was being enacted. 56 Cong. Rec. 4855 (Congressman Dent, April 9, 1918); Hearings of House Committee on Military Affairs on S. J. Res. No. 84, 65th Cong., 1st sess., pp. 4, 10 (Secretary of State Lansing, September 26, 1917).

A case occurring in 1914, between the date of these two enactments, is recorded in 3 Hackworth, *Digest of International Law* 608, disclosing that Secretary of State Lansing took the position that Puerto Ricans of American nationality should not be inducted into military service in the Dominican Republic.

On October 6, 1917, the United States District Court for the Southern District of California denied exemption from the draft to a declarant Spanish alien, despite the treaty with Spain (33 Stat. 2108) exempting aliens from military service. The court spoke of a "positive repugnancy" between the draft act and the treaty and decided that the draft act, being later in time, would be controlling. *Ex parte Larrucea,* 249 Fed. 981, 985. Moreover, vigorous protests were made by foreign diplomatic representatives, including not only the Swiss Minister but also representatives of countries with which no such specific treaty

provisions prevailed. 3 Hackworth, *op. cit.* 603, 608–610.

A procedure was developed in December 1917, by the War Department and Department of State for the release or exemption of declarant aliens at the request of diplomatic agents. This procedure was, however, termed inconvenient and unsatisfactory by the Swiss Minister, and by the Secretary of State in a letter to the House Committee on Military Affairs (February 14, 1918). 3 Hackworth, *Digest of International Law,* 603–605, 611. The Secretary of State's letter, summarizing the situation, referred to the diplomatic protests and continued (House Rep. No. 342, 65th Cong., 2d sess., pp. 2–3; 56 Cong. Rec. 4857–4858):

> * * * In some cases such requests were based upon our treaty stipulations to exempt the aliens in question from military service, which obligation seemingly must be regarded as having been violated by the selective service act. In other cases requests, little less insistent, were based on the asserted practice of nations to exempt from military service in international conflicts resident nationals of foreign countries. In still other cases, requests were founded upon treaty provisions which expressly reserve the alien nationality of persons who may declare their purpose to become citizens of the United States, but who have not completed the act of naturalization. On account of the number and insistence of such requests, and considering

the grounds upon which they were based, but without prejudice to any claims which the United States might have to the services of persons within its jurisdiction who have endeavored to absolve their former allegiance and indicated their intention to take up permanent residence in this country, the President has found it expedient in the conduct of foreign relations to indicate his willingness to discharge neutral aliens in certain circumstances, after they have been brought within his jurisdiction as Commander in Chief of the Army, by induction into the military service. Such inductions, however, which is a necessary prerequisite to discharge by the President, constitutes, in reality, a violation of the treaty obligations and asserted international practice upon which the protests of foreign diplomatic officers have been based. * * *

3. *The amendment of the 1917 Act to exempt declarant aliens upon application, and to debar from citizenship upon such application.*—The amendment suggested by the War Department and Department of State on February 14, 1918, would have exempted neutral aliens without distinction between treaty aliens and nontreaty aliens or between declarants and nondeclarants. It attached no consequences to the exemption, such as debarring from citizenship. H. Rep. No. 342, 65th Cong., 2d sess., p. 3. On April 9, in the debate on the proposed amend-

ment, a letter of President Wilson was read, stating, *inter alia,* "Whatever the general merits of the question, if we could consider ourselves absolutely free with regard to it, we are unfortunately not free but are bound by definite treaty obligations * * *" (56 Cong. Rec. 4854).

In the interval before passage of any amendment, the President announced a new procedure (April 11, 1918) under which declarants and non-declarants of treaty countries would be discharged upon request of diplomatic representatives, but only non-declarants of non-treaty countries would be discharged, and then only upon the request of the Secretary of State and in cases where a full and fair hearing had not been given by the local draft board. 3 Hackworth, *op. cit.,* 606–607.

On June 25, 1918, Senator Hitchcock introduced an amendment applying the draft to resident declarant neutral aliens who "failed to assert any claim to immunity as foreign nationals," with a proviso that "If such claim to *a*mmunity [sic] is asserted it shall be recognized and shall operate automatically as a withdrawal and cancellation of the declaration to become an American citizen, and the individual shall be forever debarred from becoming one." Senator Hitchcock supported the amendment by contending that in drafting neutrals "we are violating treaties, and to some extent are violating international comity"; that the War Department construed the then Act of Congress as "repealing

the treaties" although the State Department was "unable to take that view of it * * *"; that the debarring from future naturalization "will restrain men from setting up the claim" and was included to prevent "a good deal of ill feeling and a good deal of indignation on the part of American citizens whose sons are subjected to the draft to have their neighbors released and to stay at home to do the voting while their sons go to the war." 56 Cong. Rec. 8249.

On June 28, an amendment was offered as a committee amendment, making declarant aliens other than enemy aliens liable to the draft "except citizens or subjects of countries neutral in the present war * * *." But Senator Hitchcock, also a member of the Committee, offered an amendment in the form of a proviso which exempted only upon the withdrawal of the declaration. The debarring provision had not been included in either form. The Senator reported that the State Department preferred the committee amendment but was not opposed to the form providing for withdrawal of the declaration.

In the course of the debate, a number of senators insisted that the mere withdrawal of the declaration would not be sufficient—that the withdrawing alien should be debarred from citizenship. While there were references to the possible effect of inducing military service by aliens, the principal emphasis was on the undesirability

of exempt aliens as voters, and on the theory that naturalization qualifications had not been, and could not be, prescribed in any treaty.

The debate in the Senate on this question is so germane to the issue involved in this case that extensive quotation therefrom seems warranted (56 Cong. Rec. 8415–8419):

> Mr. HITCHCOCK. * * *
>
> The present law is that the draft includes declarants—that is, men who declare their intention to become citizens of the United States and have taken out their first papers. As far as our cobelligerents are concerned, that makes no difference; but when it comes to neutral countries, it interferes with treaty obligations, and it also interferes with the rule of international comity.
>
> The State Department, therefore, desires that the War Department shall relieve declarants from enforced military service. Heretofore the War Department has refused to do it because it has construed the act of Congress as superseding a treaty, even superseding international comity. The State Department proposes—or at least this committee amendment proposes—absolutely to exclude declarants of neutral countries, and if that is carried out we shall lose tens of thousands of soldiers.
>
> I propose in my proviso to leave the law as it is now and provide that when the declarant of a neutral country, through him-

self or through his ambassador or minister, asserts his immunity, he shall be relieved, but his act in appealing to his country shall serve to withdraw his application for American citizenship. I think that ought to be done.

* * * * *

Mr. McCumber. I wish to know why the Senator has pulled the teeth out of his amendment. A great many of us favor this very strongly as it was introduced, believing that under the comity of nations we had no right to insist that one who had merely declared his intention and had not become a citizen should join our Military Establishment, but we were in hearty accord with the view that, after having declared his intention to become a citizen, if he then refused to perform the duties of a citizen and become a soldier he should forever be debarred from the right to become a citizen. I am sorry to have the Senator leave that out of his amendment.

Mr. Hitchcock. It was because I learned through the State Department that we have a number of treaties with countries with which that might seem to be in conflict. I do not agree with the State Department on that interpretation, but after all it is not a matter of great importance to brand a man as incapable of ever becoming an American citizen. The important thing is this: When the declarant is excused from service in the Army through the interposition of the ambassador or min-

ister of his country he is, in many States of the Union, still able to vote at the American elections. I want to deprive him of that right, so that when his American neighbor is drafted and goes to the war he can not use his immunity as a foreign citizen and still exercise the right of suffrage in this country.

* * * * *

Mr. HITCHCOCK. * * * The result of it will be, in my opinion, that thousands of declarants who now appeal to neutral diplomatic representatives will go and serve the country they have already sworn to become citizens of; that they will not appeal to their ambassadors and their ministers in those neutral countries, and we think the Army will receive their service. If they do not, they certainly will not be allowed to remain in this country and vote when their American neighbors, native and naturalized, have been forced to go to the war.

* * * * *

Mr. CHAMBERLAIN. * * *

Now, Mr President, under decisions of the courts and under the rules of international law, the declarants for citizenship, those who have taken out their first papers, are still the nationals of their native country; they are not citizens of the United States. The proposal of the Senator from Nebraska [Mr. Hitchcock] is to meet a condition which exists in his State and

which probably exists in some other States of the Union, where, in violation of what seems to me to be good sense and good conscience, laws have been enacted allowing the nationals of other countries to vote. * * *

* * * * *

Mr. WILLIAMS. Then, if we want to make this amendment right, let it apply only to those who have declared their intention to become citizens in States where they cannot become voters.

* * * * *

Mr. LODGE. Mr. President, I shall not argue the venerable Martin Koszta case, with which everybody is familiar. I merely wish to suggest that the amendment as it now stands seems to me futile. I think we have got to add to it a prohibition against the alien receiving further first papers until at least the end of the war. That will give it effect.

Mr. HITCHCOCK. Mr. President, I have already indicated to the Senator from Wisconsin [Mr. LENROOT] that I shall be glad to perfect my amendment by accepting such a change.

Mr. LODGE. I should be glad to see citizenship refused altogether.

* * * * *

Mr. HITCHCOCK. Mr. President, I am endeavoring to get this amendment in such shape that it will be adopted; and while my judgment concurs with that of the Sen-

ator from North Dakota, I am confronted with the serious objection of the State Department. As it is now, the State Department has no objection to it.

Mr. LODGE. Mr. President, in that connection I should like to ask the Senator in what treaty ever made by us was there an agreement as to whom we should admit to citizenship or whom the other nation should admit to citizenship?

* * * * * * *

* * * As to naturalization, do I understand that the State Department says that in any treaty we agree to admit certain people to naturalization?

Mr. CHAMBERLAIN. Oh, no. The contention of the State Department, let me say to the Senator, is that it is a question of drafting into the service.

Mr. LODGE. * * * I am anxious to know what treaty there is in which we guarantee to admit anybody to citizenship or to first papers or anything else?

Mr. HITCHCOCK. Mr. President, I perhaps went too far when I said "the State Depa..ment." I should have said "an official of the State Department," * * *.

* * * * * * *

* * * Only one official of the State Department has called my attention to these treaties, and thought that while it is all right to withdraw their declaration of intention it might be questionable whether we should say that they are forever prevented

from becoming citizens of the United States. * * * That will result in keeping many more men in our Army, it will result in relieving the ministers from a great many appeals, and it will relieve the State Department from a great deal of work.

Mr. LODGE. I did not know that there were any treaties that interfered with our right of saying who should be citizens of the United States, and I should like to inquire into it. But, Mr. President, the thing we want to meet at this time is to prevent these men who have claimed exemption because they are subjects or citizens of another power, after they have taken out their first papers, from going around the corner and taking out another set of papers, and, in many States, exercising all of the rights of citizens, all the privileges of electing men to office, and everything of that kind, while they send the native-born Americans or the naturalized Americans across the water.

* * * * *

Mr. FALL. * * * I do not agree at all with the legal conclusions of this official of the State Department. We have naturalization treaties with certain countries, it is true. They are referred to here, if the Senate desires to hear them; but there is nothing in any one of those treaties which prevents our classifying or in any way providing the conditions upon which we will admit citizens. That is the pre-

rogative of this great Government of the United States.

Mr. LODGE. It is the prerogative of every sovereign state.

Mr. FALL. We can pass a law repealing in a moment all of our naturalization laws, despite our treaties, and we do not violate a treaty with a single country with which we have a treaty. We can repeal them absolutely. Why, sir, that is a prerogative of the Government.

Mr. LODGE. And, if the Senator will allow me, we have recently entirely revised and changed our naturalization laws and imposed new conditions.

Mr. FALL. Why, certainly; but, Mr. President, to say that even under any treaty of any kind or character the United States Government cannot at any time pass just such legislation as was indicated in the first amendment of the Senator without violating a treaty is ridiculous. We can create a class of those citizens of neutral countries who refuse their military duty here, and say that they shall never become citizens, if we so desire.

Mr. LODGE. Of course we can.

Mr. FALL. It is a classification which is permissible, as the Supreme Court has decided in the Terry case, and time and time again.

On June 29, 1918, Senator Lodge offered an amendment making liable, *inter alia*, "male persons not alien enemies, or aliens not enemies who

are covered by treaties or conventions as provided in Chapter —— of this act[20] who have declared their intention to become citizens * * *," and adding the proviso that a neutral declarant alien "shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and shall forever be debarred from becoming a citizen of the United States." 56 Cong. Rec. 8485.

This proviso was adopted in the Act finally enacted on July 9, 1918 (40 Stat. 845, 885). Of the utmost significance here, since this provision was substantially the same as that adopted in the 1941 enactment here in question (55 Stat. 844), is the statement of Senator Lodge, in response to a question whether it would violate the much broader treaties with reference to admission of aliens: "It does not interfere and cannot interfere with any treaty we have ever made. No country would submit for one moment to an agreement with another affecting the conditions on

[20] The provision with reference to treaties apparently contemplated treates with co-belligerents which had been under earlier discussion. The language concerning treaties was eliminated in the later conference report (Sen. Doc. No. 260, 65th Cong., 2d sess.; H. Rep. No. 746, 65th Cong., 2d sess.; 56 Cong. Rec. 8806).

which a foreigner could become a citizen." 56 Cong. Rec. 8485.

4. *The developments from the 1918 amendment of the 1917 Act to the original form of the 1940 Act.*—Further light on the administrative position concerning aliens was afforded by a letter of Acting Secretary of State Polk to the Attorney General on August 9, 1918, stating, *inter alia* (3 Hackworth, *Digest of International Law*, 599):

> It may be argued that the number of treaties providing for the exemption of citizens or subjects of the contracting parties from military service abroad is evidence of a practice among nations to draft aliens into their forces. I cannot, however, concur in this argument, as it seems to me that these treaties may as well be regarded as evidence that nations might, in the exigency of war, be inclined to break the law and practice of nations under which aliens are exempted from compulsory military service abroad in an international war. A review of the diplomatic history of the United States in respect to compulsory military service found in the enclosed documents discloses that, so far as the history of the United States is concerned, most countries whose subjects or citizens have been affected by military service in the United States have strongly protested against such service, as has the United States when the case was reversed. * * * It should be borne in

> mind, however, that the legislation of the United States while, of course, binding upon persons within its territory, and the announcements of Secretaries of State of the United States are not sufficient upon which to base a conclusion as to the rule of international law on this subject. For that reason I have enclosed a summary of the legislation of other countries * * *. From this convenient summary it will be observed that it is not the practice of nations to compel aliens to serve in their armies.

The Inter-American convention concerning the status of aliens, signed at Havana on February 20, 1928, prohibited compelling of "military service" by "foreigners"; it permitted "domiciled" foreigners to be compelled to perform police, fire-protection, "or militia duty for the protection of the peace of their domicile against natural catastrophes or dangers *not resulting from war.*" [Italics supplied.] 46 Stat. 2754.

On February 11, 1931, the proviso enacted in 1918 for debarring from citizenship declarant aliens who claimed military exemption was modified so that it no longer applied to withdrawals of declarations of intention and discharges after November 11, 1918. 46 Stat. 1087.

On December 10, 1932, in response to reports that the Peruvian government had attempted to compel American pilots to serve in connection with military operations, the Department of State

instructed the Ambassador in Lima that the United States could not admit the right of any foreign government to impress American aviators into military service regardless of any provisions found in contracts between Peru and the employers of the aviators. 3 Hackworth, *Digest of International Law*, 607–608.

5. *The original form of the Selective Training and Service Act of 1940, which provided no exemption for neutral aliens.*—At the Senate hearings on the first draft of the bill which became the 1940 Act,[21] the War Department suggested an amendment exempting a declarant alien "upon his making declaration withdrawing his intention to become a citizen of the United States, which withdrawal shall operate and be held to cancel his declaration * * * and he shall forever be debarred from becoming a citizen of the United States * * *."[22] The suggested amendment was not made in the printed bill of September 14, 1940. The Senate committee report (No. 2002, 76th Cong., 3d sess.) stated that "alien, nondeclarant representatives of foreign governments by reason of international law are not subject to control in this character of program" (p. 8), but made no reference to other aliens. The bill, as enacted on September 16, 1940 (54 Stat. 884),

[21] Hearings before the Senate Committee on Military Affairs on S. 4164, July 3, 5, 10–12, 1940, p. 357.

[22] There was excepted from this provision any subject of a country with which a treaty required reciprocal service of resident declarant aliens.

drafted declarant neutral aliens and contained no proviso for their exemption.

6. *Developments to and including the 1941 amendment, which provided exemption and debarment.*—On April 15, 1941, the Secretary of State recommended legislation to allow declarant aliens to obtain exemption upon making a declaration withdrawing their declaration of intention to become a citizen, the alien thus to be debarred from becoming a citizen. In letters dated April 15 and May 23, 1941, the Secretary stated, *inter alia* (Sen. Rep. No. 394, 77th Cong., 1st sess., pp. 3–4):

> * * * Some of these complaints are based on treaty provisions and the Mexican Embassy has taken the position that the drafting of its nationals for military service is contrary to the principles of international law. The Department is desirous of honoring the treaty obligations of this Government and after conferences with the other interested agencies of the Government it has concluded that the appropriate way to solve the problem is by the amendment of the Selective Training and Service Act. * * *
>
> * * * * * *
>
> It is observed that the treaty provisions on which foreign governments have based their complaints are reciprocal in their nature and that this Government has the right to claim the exemption of its nationals from military service under similar circumstances. Indeed on numerous oc-

> casions in the past it has objected to the compulsory military service of its nationals in the armed forces of foreign states even in the absence of treaty provisions guaranteeing such exemption.

The Senate Committee on Foreign Affairs reported favorably. Both the report (No. 394, *supra*) and the above letter of May 23, 1941, adverted to the fact that the proviso added by the 1918 amendment had also debarred the exempted aliens from citizenship. The report stated, further, that the draft of legislation had been agreed upon by representatives of the Selective Service System, the Department of Justice, and the Department of State and approved by the President, and that the Department of State doubted that many aliens would avail themselves of the exemption "particularly if as recommended they are forever debarred from becoming citizens of the United States, and that disability will carry with it others under our laws, such, for example, as inability to own real property in certain states." 87 Cong. Rec. 5726.[23]

[23] In connection with the State Department's approval of the debarment provision in 1941, there should be noted the 1919 opposition "in the State Department", referred to by State's Solicitor Woolsey. See Pet. Br. 13. This nonofficial opposition was premised not on the belief that a debarment provision might conflict with military exemption treaties but because "We thought that it was an illustration of a wrong principle in public policy to have a class of aliens in this country who never could become citizens." *Ibid.* As to the State Department's position in World War I, see also Appendix, *infra*, p. A84.

The legislation in the form recommended was passed by the Senate on June 30, 1941, but not by the House.[24]

The amendment for exemption of neutral aliens in the form finally adopted and here applied to petitioner, was presented in December 1941, as a part of the bill for extension of liability for military service. It provided for service by non-declarant aliens as well as declarant aliens; it made no distinction between treaty and non-treaty aliens; and it provided for exemption of aliens and debarring from citizenship upon application for exemption.

Since this bill was quickly introduced and passed in the wake of the Pearl Harbor attack in December 1941, its legislative history is barren. All that appears is that at the hearings of December 15 and 16, 1941 (Hearings, Senate Committee on

[24] The bill as passed by the Senate was to amend the 1940 Act by adding at the end of Section 3 (a) the following:

"*Provided further*, That any male alien residing in the United States who has declared his intention to become a citizen of the United States who is registered or who is or may become liable to registration under the provisions of this act shall be relieved from liability to training and service thereunder *if he makes a declaration* prior to becoming a member of the land or naval forces or within a time fixed by the President if he is already a member of the land or naval forces, in accordance with such regulations as the President may prescribe, *withdrawing his intention to become a citizen* of the United States which shall be held to cancel his declaration of intention to become a citizen of the United States and to forever bar him from becoming such a citizen." [Italics supplied.]

Military Affairs on S. 2126, 77th Cong., 1st Sess., Vol. 1, p. 46), the legislative officer of the Selective Service System testified that the bill had been considered by the War Department, and the provisions under consideration had been informally approved in substance by Mr. Raymond T. Yingling, Assistant Legal Adviser in the Department of State.[25]

The Act here involved was passed on December 20, 1941 (55 Stat. 845, 50 U. S. C. App. 303). Requests for exemption of neutral aliens were made, for the most part, in the cases of Swiss, Spanish and Costa Rican subjects, since great numbers of other aliens were either co-belligerent or enemy aliens. Appendix, *infra*, pp. A14, A60–A62, A67–A69, A70–A71, A72–A73, A78–A87. The practice adopted as to neutral aliens (particularly with reference to Switzerland and the specific case of petitioner) is set forth in the Statement, *supra*, pp. 12–19. It may be summarized as follows. Diplomatic representatives sent letters to the Department of State asking the exemption for their nationals (on an "uncondi-

[25] In his testimony, Selective Service's legislative officer also stated that the phrase concerning debarment from citizenship had been inadvertently left out of the Attorney General's copy of the bill. The Attorney General desired to make no commitment on that particular provision because there was still pending in the House the earlier proposed amendment passed by the Sen[illegible] on June 30, 1941 (discussed *supra*, pp. 62–64) and the matt[illegible], accordingly, was one solely for the determination of Congress.

tional" basis, on the part of the Swiss, by reason of the 1850 treaty). The Selective Service System, upon the basis of the language of the act, insisted on the filing of an application for exemption. The form of the application was revised to exclude language that might add an express waiver by the applicant to the debarment provision contained in the act, but the debarment provision was recited as a *caveat* in the form, below the signature. The Swiss Legation was informed that its contention that an unconditional exemption was available would have to be decided by the courts. See Appendix, *infra*, pp. A20, A23.

Certain matters subsequent to the legislation and events here in question, may also be noted. By the Act of October 29, 1945 (59 Stat. 551, Section 28 (c) of the Immigration Act of 1944 was amended to delete from the provisions of that section certain enumerated statutes repealed or superseded by more recent legislation, and to include within the definition of the term "ineligible to citizenship" the citizens of neutral countries who, by having filed applications for exemption from military service, under Section 3 (a) of the 1940 Act, as amended, had rendered themselves ineligible to citizenship. It was the interpretation of the Department of State, in a memorandum to the Swiss Legation, on November 28, 1945, that no contravention of the Treaty of

1850 was thereby involved, the Department stating, *inter alia* (Appendix, *infra*, pp. A74, A76):

> It is to be noted that none of the legislation mentioned above in any manner deprives Swiss citizens of the privileges or exemptions enjoyed under the Treaty of Friendship and Commerce concluded between the United States and Switzerland in 1850, including that provision of the Treaty to the effect that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service." While Swiss citizens are exempt from military service, there is no provision in the Treaty relating to the qualifications of nationals of one of the countries to become citizens of the other. Naturalization questions are outside the purpose and purview of the Treaty.

The position of the executive branch of the Government, as of August 16, 1946, may also be noted in the following memorandum from the President's Military Aide to the Acting Secretary of State (Appendix, *infra*, p. A77):

> There has been considerable correspondence regarding the matter of citizens of countries with whom we have bilateral treaties relative to their liability for military service. The President has not had time to go into the various fine details of the argument, but his position is as follows:
>
> He is of the opinion that now that direct participation in war has ceased, the aliens

> of the four or five countries with which we have bilateral treaties residing in the United States should be excused from Selective Service. He feels that this would make for good feeling and that the number of men that would be lost to military service would be infinitesimal. He also, however, is of the strong opinion that anyone excused from military service by virtue of these agreements, both during the war and after, should be forever excluded from attaining citizenship.

In the respective bills leading to the Selective Service Act of 1948, the Senate Bill provided exemption for aliens, but persons exercising the exemption were to be debarred from citizenship. The House amendment excluded nondeclarant aliens from liability for service. The conference agreement of June 19, 1948, adopted the provisions of the Senate bill "but insuring that properly deferrable aliens may be relieved from liability for induction without debarment from citizenship." (H. Rep. 2438, 80th Cong., 2d sess., p. 45.) Section 6 (a) was apparently considered capable of effecting the last mentioned purpose by relieving from liability "persons in other categories to be specified by the President, residing in the United States, and who have not declared their intention to become citizens of the United States." 50 U. S. C. App., Supp. III, 456 (a). This provision had been included, in nearly identical language, in Section 5 (a) of the 1940 Act, by the amendment of December 20, 1941

(55 Stat. 844, 845), but we find no record of its use.[26] Under the later, 1948 Act, all nondeclarant treaty aliens were by a general regulation on August 30, 1948, deferred to class IV–C, if such deferment was requested by their government and approved by the Department of State (13 F. R. 5033; 32 C. F. R. 622.18 (b)).[27]

7. *Summary and conclusions.*—It appears from the foregoing that though sometimes honored only in the breach, particularly by the Congress in the heat of the early stages of war, a treaty right,

[26] By approving a State Department memorandum, the President, on September 24, 1944, appears to have granted some exemption to treaty aliens, though apparently only to co-belligerent Costa Ricans who could, as co-belligerents, not otherwise secure exemption. Appendix, *infra*, p. A88. But, whatever its scope, that exemption could not aid petitioner since it was granted after Moser claimed and was granted exemption, and, secondly, the exemption, under Section 5 (a) of the Selective Training and Service Act of 1940, see *supra*, pp. 3–4, could apply only to nondeclarants, and Moser was, in fact, a declarant. See *supra*, pp. 25–26. The Presidential exemption referred to was not incorporated into the Selective Service regulations and its effectiveness is consequently problematical.

[27] Petitioner suggests (Br. 17) that the 1948 regulation referred to in the text simply made explicit the procedure followed under the 1941 amendment of the Act of 1940. See also Br. 22, 32. That is not true. Both the 1940 Act (section 5 (a) and the 1948 Act (section 6 (a)) left the President free only as to nondeclarants and, as has been noted, *supra*, note 26, petitioner, being a declarant, could not have been comprehended in any executive exemption. The procedure applicable in petitioner's case was not the automatic exemption granted in 1948; to secure exemption under the 1940 Act, as amended, a personal application for exemption was required. Hence there is no parallel between the 1948 procedure and that applicable in this case.

and sometimes, a less specific right under international law, of aliens to be free from general military service, has been recognized. But at no time have the officials of our Government recognized a concomitant right to American citizenship in neutral aliens who refuse military service.

From the days of the Civil War, freedom from military service and a right to citizenship have been deemed related only to the extent that it has been felt that a refusal of service by an alien was ground for disqualifying him as an applicant for citizenship. It has never been thought here that recognition of a right to freedom from military service precluded debarment from citizenship as a consequence of a claim to such right. This is partly because the bar to naturalization has been conceived of not as a penalty attaching to a refusal to serve. Instead the thought has been, as Senator Doolittle first put it, *supra,* p. 41, that an alien pleading exemption "is not proving that he is a good citizen and attached to the Constitution." Compare *In re Trachsel,* 271 Fed. 779 (S. D. Ohio) (Swiss alien); *Petition of Escher,* 279 Fed. 792, 793 (S. D. Tex.) (same). See also Hazard, *"Attachment to the Principles of the Constitution" as Judicially Construed in the United States* (1929) 23 A. J. I. L. 783, 785, 791–802.

While under the Selective Service Act of 1948, *supra,* pp. 68–69, the President, exercising a discretion conferred on him by Congress, has relieved nondeclarant treaty aliens from service without imposing a naturalization debarment, there is no evi-

dence whatever that that has been done under a sense of compulsion imposed by treaty obligation.

II

THE DEBARMENT PROVISION OF SECTION 3 (a) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, APPLIES TO "TREATY ALIENS"

If, as we have sought to show in Point I of the Argument, *supra,* pp. 30–70, the treaty of 1850 between the United States and Switzerland had nothing to do with naturalization and did not preclude debarment from citizenship as a consequence of a claim to freedom from military service, there would seem to remain no real question that the treaty and the debarment from citizenship provision in Section 3 (a) of the Selective Training and Service Act of 1940, as amended, see *supra,* p. 3, can stand together.[28]

[28] It is one thing to make debarment from the "political right" of citizenship not covered by the treaty of 1850 a consequence of a claim to military exemption, and quite another to deport an alien who makes such claim, as Congressman Lufkin proposed to do in 1919. See Pet. Br. 12–13. For the right of the nationals of one country to "establish themselves permanently" in the other is specifically granted by the same Article of the treaty of 1850 (Article I) which specifically excepts "political rights". See *supra*, pp. 32–33. Hence the opposition of the State Department to this proposal is not at all relevant to the question here involved.

Similarly, the federal district court decisions arising under the 1917 Act, cited by petitioner (Br. 13–14) are irrelevant. They stand only for the proposition that the unamended 1917 Act, see *supra*, pp. 45–48, compelling the military service of declarant aliens and giving them no opportunity to claim exemption, is inconsistent with a treaty granting freedom from military service. That proposition is undisputed here.

In other words, when in 1941, Congress provided, in Section 3 (a) of the Selective Training and Service Act, *supra,* p. 3,

> That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

it did not take from the petitioner anything granted him by the treaty of 1850. The benefits inuring to one claiming exemption under the treaty and to one claiming exemption under the Act are identical—relief from military service.[29] 2 Hyde, International Law (1922) p. 256.

The treaty of 1850 does not preclude voluntary enlistment of nationals of the respective signatory powers in the armed forces of the other (cf. 4 Moore, *Digest of International Law,* p. 66),

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[29] Petitioner seeks to support his claim of conflict between the treaty and the statute by referring (Br. 19) to "the amendment to the Immigration Act of 1924 (59 Stat. 551) which rendered inadmissible for permanent residence, neutral aliens who claimed draft exemption." There is no occasion in this case for deciding whether that provision and the treaty right to reside in this country may stand together, for the right to citizenship here involved is distinct from a mere right of residence. Compare *supra,* note 28, p. 71.

and there were many "treaty aliens" who refused to take advantage of these rights and elected to serve their adopted country. When, however, petitioner chose to exercise his "treaty option" to choose freedom from military service and thus to free himself from the liability to military service imposed on him by Section 3 (a) of the Selective Training and Service Act, he incurred "that bar" which "comes into existence when an alien resident liable for service asks to be relieved." *McGrath* v. *Kristensen*, 340 U. S. 162, 172.

Indeed, petitioner seems to concede as much, for he says that if the statute and the treaty are not inconsistent, "petitioner mistakenly attempted to perform an act which was impossible as a matter of law, i. e. to seek draft exemption under the treaty without incurring the disability of the Act." (Br. 24.) He seeks, however, to invoke an estoppel against the Government, urging that petitioner acted under mistake of law "known to, shared and induced by the Department of State and the Selective Service System," and concluding that "the statute should be liberally construed to avoid the imposition of the penalty." (Br. 25.)

Reserving for the moment the question of whether there is any basis for estoppel in the circumstances of this case (see Point III, *infra*, pp. 79–88), it should be noted, initially, that an estoppel, if any, would have no relevance to how the statute should be construed; estoppel is a

matter distinct and apart from the proper reading to be given the statute. In any event, construction of Section 3 (a) of the Selective Training and Service Act to make its debarment provision inapplicable to petitioner would be in the face of Congress' explicit purpose to debar aliens claiming exemption from service whether or not the claim is conceived of by the applicant as one made under the treaty, under international law, or solely under the Selective Training and Service Act.

A. CONGRESS INTENDED THE DEBARMENT PROVISION TO BE APPLICABLE TO ALIENS CLAIMING EXEMPTION UNDER A TREATY

As we have seen, the prototype of the statutory provision here involved appeared first in the 1918 amendment to the Selective Draft Act of 1917. 40 Stat. 845, 885. That amendment provided that a neutral declarant alien

> shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States.

This provision was inserted, significantly, because, and not in spite of the fact that, as President Wilson put it, "we are bound by definite treaty obligations." 56 Cong. Rec. 4854. The amend-

ment was supported in the Senate because it was said that in drafting neutrals, "we are violating treaties, and to some extent are violating international comity." 56 Cong. Rec. 8249.

When it was decided that a claim to exemption should result in debarment from citizenship, there was no thought that this consequence could be avoided by treaty aliens. An explicit contrary purpose was, indeed, revealed. For, as stated on the floor of the Senate (56 Cong. Rec. 8418), "there is nothing in any one of those treaties which prevents our classifying or in any way providing the conditions upon which we will admit citizens." See *supra*, p. 56.

Similarly, in 1941, when proposals which eventuated in the statutory provision here in question were made (see *supra*, pp. 62–65), the Senate Committee on Military Affairs stated (S. Rep. No. 394, 77th Cong., 1st sess., p. 2):

> The State Department considers that this proposed legislation should be enacted in order that the Government may honor its treaty obligations; that as a practical matter it is doubted that many alien declarants will avail themselves of the right to claim exemption, particularly if as recommended they are forever debarred from becoming citizens of the United States * * *"

A statute thus designed to honor treaty obligations can hardly be read as inapplicable to persons like petitioner to whose benefit those obligations redounded.

But petitioner states that the Selective Training and Service Act renders ineligible to naturalization only "those relieved from liability under this Act," and argues that petitioner was relieved from liability under the treaty and not under the Act (Br. 22–23). Passing petitioner's free reading and quotation of the Act,[30] the short answers to his argument are found in Congress' specific purpose outlined above (*supra,* pp. 74–75), the fact that the Act did impose the liability to serve from which he was relieved,[31] and the fact that nothing in the Act makes the applicability of the debarment from citizenship proviso turn on whether the alien has not only a statutory, but also a treaty, right to be relieved from that liability. The phrase "under this Act," in Section

[30] Section 3 (a) does not contain the quoted phrase, "those relieved from liability under this Act." See *supra*, p. 3.

[31] Section 3 (a) of the Act provides that "every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States." See *supra*, p. 3.

Under Section 5 (a) of the Act, *supra*, pp. 3–4, only certain specified groups within which petitioner does not fall "and persons in other categories to be specified by the President, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States * * * shall be relieved from *liability* for training and service." [Italics supplied.] Since petitioner was not brought by the President within Section 5 (a), and probably could not have been since he was a declarant alien, he was liable for service under the Act. See *supra*, note 26, p. 69.

3 (a) applies only to the "training and service" and at no point refers to the source of the alien's exemption from service.

B. TO IMPLY AN EXCEPTION TO THE DEBARMENT PROVISION IN FAVOR OF THOSE HAVING A PRE-EXISTING RIGHT TO FREEDOM FROM SERVICE WOULD TEND TO MAKE THE DEBARMENT PROVISION NUGATORY

The right to be free from military service that is granted by the treaty here in question is, to a very large degree, merely declaratory of a right generally deemed to be granted by international law. Thus, as early as 1804, Secretary of State Madison set forth the international understandings, employing the following language in a message to the Minister to England (4 Moore, *Digest of International Law* 52):

> Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both, and the violation of this law by the avowed impressment of American citizens residing in Great Britain may be pressed with the greater force on the British Government, as it is in direct inconsistency with her impressment of her own subjects bound by much stronger ties to the United States, as above explained, as well as with the spirit of her commercial laws and policy,

> by which foreigners are invited to a residence. The liberation of the persons comprehended by this article, therefore, can not be justly or honorably refused, and the provision for their recompense and their return home is equally due to the service rendered by and the wrong done to them.

This understanding of the law of nations has often been reiterated by our Secretaries of State (*supra,* pp. 39, 46, 47–48) and the matter is perhaps most fully discussed by Acting Secretary of State Polk, in a letter of August 9, 1918, quoted *supra,* pp. 59–60.

Consequently, if Section 3 (a) of the Selective Service Act of 1940, as amended, were to be construed as inapplicable to "treaty aliens", it would become exceedingly difficult to draw that line without excepting from its debarment provisions resident neutral aliens generally. For they, like "treaty aliens", under the general international understanding, have a cognate right to freedom from military service which, petitioner's argument assumes, is somehow infringed upon by the debarment provision. Hence, acceptance of petitioner's argument might well render the debarment provision of Section 3 (a) nugatory, a result which is, of course, always to be shunned. *Unity* v. *Burrage,* 103 U. S. 447, 457; *United States* v. *Tappan,* 11 Wheat. 419, 426.

While a treaty (conventional international law) may well have greater stature and is certainly more specific than "customary" international law, Con-

gress has consistently dealt with treaty neutrals and nontreaty neutrals alike, and its strictly legal power to abrogate the rights of both groups is equal. Accordingly, to urge a construction that would eliminate the debarment where a pre-existing or separate exemption appears, is to urge the inapplicability of the debarment in practically all such cases and, consequently, the flouting of the clear Congressional purpose. See *supra,* pp. 74–75.

III

THE GOVERNMENT IS NOT ESTOPPED FROM INSISTING THAT THE PETITIONER IS DEBARRED FROM CITIZENSHIP

Petitioner contends that in applying for exemption from military service, he committed a "mistake of law * * * induced and shared" by the Government (Br. 25), in effect, that he was lulled into the belief that he would not be barred from citizenship notwithstanding his claim for exemption. *Supra,* p. 73. While he admits that "normally mistake of law will not permit the avoidance of an obligation," he insists that the courts should grant relief where the mistaken action was taken upon the advice of the Government (Br. 25). But petitioner is wrong, firstly, as to the facts, and, secondly, as to the law.

A. THE UNITED STATES GOVERNMENT DID NOT TELL PETITIONER THAT HE COULD CLAIM EXEMPTION FROM SERVICE AND REMAIN ELIGIBLE FOR CITIZENSHIP

It should be noted at the outset that no agency of the United States Government is shown to have

communicated any views to petitioner directly. All correspondence in petitioner's case which emanated from the Government of the United States was directed to Swiss government officials. Moreover, the representatives of the United States Government at no time, either by their statements or by the revision of DSS Form 301, led the Swiss Legation to believe that the course chosen by petitioner to secure his freedom from military service was a procedure through which petitioner would escape the debarment from citizenship. While DSS Form 301 and the Selective Service Regulations were revised in 1943 in response to protests on behalf of "treaty aliens" (see *supra*, pp. 12–15), the Swiss were given no reason to believe that their nationals would thereby be relieved of the consequences of debarment. The informal understandings between the officials of the Department of State, the Selective Service System, and the diplomatic representatives of Switzerland produced a form effective only to avoid any personal waivers or estoppel on the part of Swiss nationals with respect to trying out the issues in the courts. They were freed only from formally acknowledging in writing that their application on Form DSS 301 would preclude them from becoming citizens of the United States. But the revised form (R. 14–15) carried explicit warning of a possibility of debarment.

It was only the full opportunity for judicial

review of the Swiss contention that was sought to be preserved. The Department of State explicitly asserted its desire to have the legal effect of such an application decided at some future date by proper judicial authority. (Appendix, *infra,* pp. A20, A23). And there is no doubt that the Swiss Legation interpreted the matter in this vein. For its letter sent to the petitioner advised him that "The final decision regarding your naturalization," in consequence of the filing of the revised Form DSS 301, "will remain solely with the competent Naturalization Courts" (R. 31).

The finding of the district court that the State Department and the Selective Service System recognized that petitioner had an immunity under the treaty (R. 59–60), even if it were entirely sustained by the evidence,[32] does not support a conclusion that these agencies assumed or conceded the inapplicability of the debarment provision to those having a treaty right to exemption. As pointed out, *supra,* pp. 71–77, recognition of a treaty right to exemption in no way constituted recognition of a concomitant right to be free from the consequence of debarment from citizenship. Indeed, it is clear that the Selective Service Sys-

[32] There is no evidence that Selective Service recognized a "treaty right" to exemption. Compare Appendix, *infra,* pp. A2, A5, A20.

tem and the Department of State treated the problems as distinct.[33]

In short, there is nothing in the record to indicate that the administrative authorities of the United States were in any way mistaken with regard to the legal effects of petitioner's application for exemption from military service, or that they induced an erroneous conclusion as to the law on this matter. There was, at most, a difference of opinion between the Americans and the Swiss as to whether the debarment would apply to persons in petitioner's position.

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[33] As appears from General Hershey's letter in the Appendix, *infra*, pp. A2, A6, "It was always the position of the Selective Service System that the signing of either the original or revised Form 301 clearly brought the alien within the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended December 20, 1941."

And in a communication from the Department of State to the Swiss Legation, quoted *supra*, p. 67, and see Appendix, *infra*, p. A76, the view of that Department is stated, in part, as follows: "While Swiss citizens are exempt from military service, there is no provision in the Treaty relating to the qualifications of nationals of one of the countries to become citizens of the other. Naturalization questions are outside the purpose and purview of the Treaty."

It may be noted that the Board of Immigration Appeals appears to have held that Swiss nationals claiming exemption under the treaty are debarred from citizenship by Section 3 (a) of the Selective Training and Service Act of 1940, as amended. *In re Ernest Walter Kutil*, A-4197506, June 20, 1947; *In re Hans David Lowe*, A-5878178, July 14, 1947. Both of these decisions are summarized in Appleman, *Neutral Aliens Who Claimed Exemption from Military Service* (November 1947), 5 Monthly Review, Immigration and Naturalization Service, pp. 56-59, referred to in peti-

B. THE SWISS GOVERNMENT DID NOT TELL PETITIONER THAT HE COULD CLAIM EXEMPTION FROM SERVICE AND REMAIN ELIGIBLE FOR CITIZENSHIP

Neither the letter to petitioner of February 3, 1944 (R. 19) from the Consulate General of Switzerland, nor the letter of February 18, 1944 (R. 30), from the Legation of Switzerland, contained any assurances to petitioner that he would not be debarred from future naturalization by taking advantage of the Form DSS 301 procedure. The former stated that the Swiss Legation was of the opinion that petitioner was a non-declarant and that his exemption was being requested of the Department of State (R. 19). The latter stated that by claiming exemption petitioner would not waive his "*right to apply*" for citizenship, but that final decision with respect thereto would "remain solely with the competent Naturalization Courts" (R. 31—italics supplied). It is apparent, as pointed out by the Court of Appeals (R. 66), that the "*right to apply*" for citizenship is not synonymous with the right to obtain citizenship. The right to *apply* for citizenship is available to any alien whose application contains the requisite allegations, and the clerks of the courts are required to accept such applications. The right *to obtain* citizenship rests upon the applicant's fulfillment of the statutory requirements and is a matter within the jurisdiction and legal discretion of the Naturalization Court. *In re Halladjian, et al.*, 174 Fed. 834 (C. C. D. Mass.); *Peti-*

tion of Ajlouny, 77 F. Supp. 327, 329 (E. D. Mich.); see also *Tutun* v. *United States,* 270 U. S. 568, 578.

The foregoing distinctions and warnings were not reasonably to be ignored by a man of petitioner's age, education, and experience with the intricacies of citizenship matters. He had availed himself, properly, of the procedure involved in an original entry via Canada, he had had experience with the strict construction of rules in connection with his difficulties in 1940, and he must have been aware at a very early stage of his experience with citizenship forms, that availing one's self of an alien's military exemption was a serious matter, for he had been confronted with the question, "Did you claim exemption during the World War because you were an alien?" See *supra,* pp. 8, note 1, 9.

Nor does it follow from the fact that petitioner claimed "unconditional" relief from military service that such was granted, or that he was led to believe that such was being granted. The form which he executed (R. 14–15) gave him explicit notice that his claim might well result in his debarment from citizenship.

It may be conceded that petitioner waived no treaty rights when he applied for exemption from military service on Form DSS 301, and that his desire ultimately to obtain United States citizenship was, at all times, paramount in his mind. However, the contention that petitioner did not

because the revised form, which he executed, contained no personal waiver of such right, is entirely without merit. Section 3 (a), *supra*, p. 3, as distinguished from the 1918 Act, *infra*, pp. 90–91, contains no requirement for a personal withdrawal of naturalization rights. Its wording is clear and unambiguous. It is susceptible of but one construction, namely, that he who accepts military exemption thereby incurs forfeiture of the privilege of future citizenship. It is not the form by which application for relief is made which results in the statutory disability; it is the act of claiming relief which produces that result, and the result is unaffected by the manner in which the relief is procured. Both revised and unrevised forms clearly put petitioner on notice as to the consequences of his act in executing either form. As the Court of Appeals held (R. 66), the fact that petitioner "did not fully comprehend the legal consequences of his act, through no fault of this government, does not entitle him to any relief from the disability which the statute has made the result of his exemption." See also *In re Tomarchio*, 269 Fed. 400 (E. D. Mo.).

C. THERE CAN BE NO CITIZENSHIP BY ESTOPPEL.

In any event, the United States may not ordinarily be estopped. "At least it is true that no such result would be reached if a strict construction of the Government's act would avoid it." *Sanitary District* v. *United States*, 266

U. S. 405, 427, and cases cited. Particularly is this true when the matter involved is one of "national and international concern." *Ibid.* Moreover, the United States cannot be estopped from asserting its rights in a legal proceeding because of any mistaken or unauthorized action by its officers or agencies. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *United States* v. *San Francisco,* 310 U. S. 16, 31–32; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 31; *Jeems Bayon Club* v. *United States,* 260 U. S. 561, 564; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291; *Cramer* v. *United States,* 261 U. S. 219, 234.[34]

The doctrine here advanced, of a right to citizenship by estoppel, is a unique one, and the serious consequences of the adoption of any such notion are apparent. "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor

[34] *Staten Island Hygeia Ice & Cold S. Co.* v. *United States,* 85 F. 2d 68 (C. A. 2), upon which petitioner relies (Br. 25–26), was a very different case from that at bar. There, as the court pointed out (p. 71), "the law was no longer in doubt" when a mutual mistake of law was committed by the taxpayer and the collector. The Supreme Court had there previously settled the law and "official information of that decision had been given to internal revenue officers * * *; hence the deputy collector was acting contrary to his duty in demanding payment."

In the present case, the law was in dispute, and, it is submitted, the American administrative view which was taken in opposition to the Swiss was not, in fact, a mistaken one but a correct one.

of the United States and against the claimant." *United States* v. *Manzi*, 276 U. S. 463, 467.

There is a striking similarity between the finding of the district court in this case, that "if in January, 1944, [Moser] had been told that * * * he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, that he would have elected to do the former" (R. 55) and the finding of the district court in *Savorgnan* v. *United States*, 338 U. S. 491, 495, that "petitioner, although intending to obtain Italian citizenship, had no intention of endangering her American citizenship or of renouncing her allegiance to the United States.[35] And the finding in this case can no more aid petitioner than did the finding in her case aid Mrs. Savorgnan.

The opinion of this Court in the *Savorgnan* case is equally apt here (338 U. S. at 499–500): "There is no suggestion in the statutory language that the effect of the specified overt acts [here the claim of military exemption], when voluntarily done, is conditioned upon the undisclosed intent of the person doing them." "The petitioner, in the instant case, was a competent adult." He "voluntarily and knowingly sought and obtained" military exemption. He knew that

[35] "* * * the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.' *Doreau* v. *Marshall*, 170 F. 2d 721, 724 (C. A. 3d Cir.)" *Savorgnan* v. *United States*, 338 U. S. 491, 502, note 18.

DSS 301 revised "related to [his] citizenship and that [his] signature" on it "was an important condition upon which" his exemption "depended." "On that basis", he was exempted. "Whatever the legal consequences of those acts may be, [he] is bound by them." 338 U. S. at 502.

IV

THE INELIGIBILITY FOR CITIZENSHIP IMPOSED BY SECTION 3 (a) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, HAS NOT BEEN TERMINATED

Petitioner contends that since the petition for naturalization which began this case was filed after March 31, 1947, the date of the expiration of the Selective Training and Service Act of 1940 (see Section 16 (b), *supra,* p. 4), any ineligibility for citizenship imposed on him in 1944, by his application for military exemption, has been removed (Br. 27–31). But the language of Section 3 (a) clearly shows the permanent nature of the ineligibility intended by Congress, which provided that a neutral alien who claimed exemption from military service "shall *thereafter* be debarred from becoming a citizen of the United States". [Italics supplied.]

The fact that the petition for naturalization in this case was filed after the expiration of the Act is immaterial, for the disability imposed by the statute did not attach to an application for citizenship, but to the applicant. It is a personal

disqualification which survives the exemption as well as the Congressional enactment. The ineligibility for citizenship became complete and final when petitioner applied for and obtained exemption from military service. In view of the purposes of the Selective Training and Service Act, it is inconceivable that the Congress intended the disqualification from citizenship to endure for only the period of hostilities during which the alien enjoyed freedom from military service, and might well temporarily forego citizenship in return for such military exemption. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59.

A. CONGRESS INTENDED A PERMANENT DEBARMENT

However, the Congress has not left its purpose to inference. Bars to citizenship have appeared in Section 2 of the Selective Draft Act of 1917, as amended (40 Stat. 76, 884), in Section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 855, 55 Stat. 844), and in Section 4 (a) of the Selective Service Act of 1948 (62 Stat. 604; 50 U. S. C. App., Supp. III, 454). Without more, this consistent legislative policy to deny citizenship to neutral aliens who claim exemption from service clearly indicates that Congress intended such bars to be permanent except

where it affirmatively acts to end the bar. This is made particularly clear by the history of the disqualification for citizenship imposed by the Selective Draft Act of 1917, as amended, upon which the statutory provision here in question was modelled.

In 1918, the Senate, sitting as the Committee of the Whole, agreed first to the following proviso (56 Cong. Rec. 8419, 8485):

> And he shall not be entitled to make a new declaration *during the existence of the war in which the United States is now engaged.*[36]

But in accordance with his stated preference for a permanent debarment (56 Cong. Rec. 8416, and see *supra,* p. 54), Senator Lodge, on June 29, 1918, offered an amendment (56 Cong. Rec. 8485) which was subsequently enacted into law as Section 2 of the Act of 1917. It provided that (40 Stat. 885)

> * * * a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration

[36] Italics supplied.

> of intention to become an American citizen and he shall *forever* be debarred from becoming a citizen of the United States. [Italics supplied.]

Petitioner cannot read the comparable provision in the 1940 Act as accomplishing what Congress specifically decided not to do.

There was no specific statute terminating the World War I Selective Draft Act. The local boards organized under that statute ended their activities on December 10, 1918, and their records were thereafter sealed. Second Report of Provost Marshal General (1919), p. 3. The only legislative termination appears to have been accomplished by Public Resolution 64 of March 3, 1921, 41 Stat. 1359, which was the resolution ending World War I and terminating statutes which were dependent upon the continuation of that conflict.[37]

However, by subsequent legislation the Congress again clearly indicated that it regarded the bar to citizenship incurred by neutral aliens under Section 2 of the 1917 Act as remaining in

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[37] A proviso, 41 Stat. 1360, stipulated, "That nothing herein contained shall be construed as effective * * * to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, p. 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof."

effect indefinitely, notwithstanding the general expiration of that statute. In Section 28 (c) of the Immigration Act of 1924 (43 Stat. 153, 168, 8 U. S. C. 224 (c)), Congress defined the phrase "ineligible to citizenship" for the purpose of that statute as including any alien ineligible for citizenship under Section 2 of the Selective Draft Act of 1917, as amended.[38] In 1925, the ineligibility to citizenship was carried into the United States Code as Section 366 of Title 8. In 1931, Congress again recognized the continuing nature of the ineligibility by limiting its future application to those neutral aliens who had applied for exemption up to and including November 11, 1918 (46 Stat. 1087).[39] The enduring nature of the debarment was expressly recognized by both the House and Senate Committees which considered the 1931 legislation, as evidenced by their Reports. H. Rep. 910, S. Rep. 923, 71st Cong., 2d sess. It was not until 1940, that the Congress,

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[38] Under Section 13 (c) of the Immigration Act of 1924 (8 U. S. C. 213 (c)), such aliens were excluded from the United States. See *supra*, note 28, p. 72.

[39] The Act of February 11, 1931, 46 Stat. 1087, which was codified as 8 U. S. C. (1934 ed.) 366a, reads as follows:

"That, notwithstanding any provision of law to the contrary, no alien shall be debarred from becoming a citizen of the United States on the ground that he withdrew his intention to become a citizen of the United States in order to secure discharge from the military service, if such withdrawal (and the application therefor) and discharge took place after November 11, 1918."

in Section 504 of the Nationality Act (54 Stat. 1137, 1172; 8 U. S. C. 904) specifically repealed the debarment.[40] In 1945, Congress acted consistently with this repeal (Act of October 29, 1945, 59 Stat. 551) by amending the definition of the phrase "ineligible to citizenship" in Section 28 (c) of the Immigration Act of 1924, so as to eliminate the reference to neutral aliens who had claimed exemption from military service under the Selective Draft Act of 1917. It should be noted, however, that the lower courts have been divided as to whether even the 1940 repealer terminated the disqualification. *Petition of Otness,* 49 F. Supp. 220 (N. D. Cal.) holding the disqualification to be removed; contra, *In re Urmeneta,* 42 F. Supp. 138 (E. D. Wis.), and *In re Samowich,* 70 F. Supp. 273 (W. D. Wash.). The significant thing is that the Congress considered that the ineligibility for citizenship imposed by the Selective Draft Act survived the expiration of that statute and continued until specifically terminated by the Congress.

There is no evidence of any contrary purpose in the history of the Selective Training and Service Act of 1940. Section 16 (b) of the 1940 Act originally declared that the Act was to become inoperative on May 15, 1945. But there is not even the slightest evidence that by setting

[40] See Immigration and Naturalization Service, Interpretation No. 1, June 5, 1941.

this time limitation Congress wished to expunge a disqualification which had previously been incurred. On the contrary it seems evident that Congress looked to the future and that it sought to chart a terminal point beyond which the selective service machinery would no longer be needed. This expectation proved premature and, on May 9, 1945, the expiration date was postponed one year. 59 Stat. 166. Another short extension, 60 Stat. 181, was followed by the last amendment on June 29, 1946, 60 Stat. 342, which set the expiration date at March 31, 1947.[41] It is on this last extension that petitioner relies. But he has not only overlooked the purpose Congress sought to fulfill in prescribing and extending this expiration date, but has also ignored the failure of Congress specifically to remove the ineligibility of neutral aliens who claimed exemption under the 1940 Act, while taking just such action in 1940 with respect to aliens who claimed exemption under the 1917 Act. See *supra,* pp. 92–93. The conclusion is inescapable that Congress intended continuing ineligibility for citizenship as a consequence for neutral aliens availing themselves of exemption from military service.

[41] Although the statute was allowed to expire on that date the absence of selective service legislation endured only for a brief period. The following year witnessed the enactment of a new Selective Service Act of 1948, containing many similar provisions.

B. THE DEBARMENT IS NOW EMBODIED IN THE PERMANENT IMMIGRATION LAW

Any doubt as to the Congressional purpose in this matter must be dispelled by the fact that on October 29, 1945, Congress enlarged the definition of the "ineligible to citizenship" class, found in Section 28 (c) of the basic Immigration Act of 1924 (59 Stat. 551, 8 U. S. C. 224 (c)) by including therein those disqualified by Section 3 (a) of the Selective Training and Service Act of 1940. This action was inconsistent with any assumption that Congress regarded the debarment as repealed. The very act of making the debarment a criterion of a permanent law, following the termination of the armed conflict and when the Selective Training and Service Act was due to expire, manifests a Congressional intent to treat it as an enduring bar, like that imposed by the 1917 Act. It was in this 1945 Act of Congress that the Court in *Benzian* v. *Godwin,* 168 F. 2d 952, 955 (C. A. 2), certiorari denied, 335 U. S. 886, found an intent to continue the debarment from citizenship beyond the expiration of the Act of 1940.

C. 1 U. S. C. 109 SUPPORTS THE CONCLUSION THAT THE DEBARMENT CONTINUES

An important element in arriving at an evaluation of the Congressional design is found in 1 U. S. C., Supp. III, 109, formerly R. S. 13 and 1 U. S. C. 29, which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the temporary statute shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [Italics supplied.]

In the light of this enactment, it is irrelevant to refer to a supposedly contrary common-law rule. For any such rule has been superseded since 1871 by this specific legislation, which must be regarded as a general saving clause to be read into all repealing statutes. *Hertz* v. *Woodman,* 218 U. S. 205, 218; *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 465. Even when the repealing statute itself has a specific saving clause, the provisions of 1 U. S. C., Supp. III, 109 cannot be disregarded. Both saving clauses must be read and applied together, and the general clause

of Section 109 will yield to the later specific clause only in the event of inconsistency. *Ibid.* Here there is no inconsistency between 1 U. S. C., Supp. III, 109 and the provisions of Section 16 (b) of the Selective Training and Service Act, as amended. Since there is no specific legislative directive ending the ineligibility of neutral aliens who claimed exemption from military service, their disability survived repeal of the statute. See *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

The reservation of "penalties, forfeitures, and liabilities" in 1 U. S. C., Supp. III, 109 necessarily encompasses the forfeiture of the privilege of naturalization which had attached to petitioner. *United States* v. *Reisinger,* 128 U. S. 398, rejected the contention that this language did not reach criminal penalties, and later cases have affirmed the converse—that this saving clause does operate to continue civil liabilities and disabilities not expressly terminated. *Hertz* v. *Woodman,* 218 U. S. 205, 218; *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
J. F. BISHOP,
EDWARD S. SZUKELEWICZ,
Attorneys.

MARCH 1951.

APPENDIX

FEBRUARY 1, 1951.

ALEXANDER NUTA, ESQ.
Assistant General Counsel,
Room 502, Selective Service System,
Washington, D. C.

DEAR MR. NUTA: The Supreme Court has requested that in *Moser* v. *United States,* October Term 1950, No. 301, we advise the Court, *inter alia,* as to the practice under the Selective Training and Service Act of September 16, 1940, as amended December 20, 1941, in dealing with citiens of countries with whom the United States had treaties similar to the Convention of Friendship, etc., between the United States and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855 (11 Stat. 587, 589). We would appreciate a statement setting forth all available information (together with copies of pertinent records and correspondence) as to the practice with respect to Swiss subjects residing in the United States and seeking exemption under Section 3 (a) of the Act, and with respect to subjects of other countries involving similar treaties in seeking such exemption.

Sincerely yours,

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1712 G. STREET NW.,
Washington 25, D. C.

FEBRUARY 13, 1951.

In Replying Address
The Director of Selective Service
And Refer to No.
6-59-1

MR. PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: This will reply to your letter of February 1, 1951, requesting a statement regarding selective service practice in dealing with citizens of countries with whom the United States had treaties similar to the Convention of Friendship, etc., concluded November 25, 1850, between the United States and the Swiss Confederation, in administering the provisions regarding aliens of the Selective Training and Service Act of 1940, as amended.

This Act, as originally enacted September 16, 1940, provided in Section 3 (a) "Except as otherwise provided in this Act, every male citizen of the United States and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States."

Section 5 (a) of the Act enumerated as those aliens to be exempt from registration and service, diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, residing in the United States, who were not citizens of the United States, and who had not declared their intention to become citizens of the United States.

With the entry of the United States into the war following Pearl Harbor, the alien residing in the United States took on greater importance, both as an available source of manpower and as a possible menace to our national security. The Congress took cognizance of these facts and on December 20, 1941, amended the Selective Training and Service Act of 1940 in regard to the liability of aliens for military service. As amended December 20, 1941, Section 3 (a) reads as follows:

> "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and

in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: Provided further, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces.

Section 5 (a) was amended by inserting a comma after the words "foreign countries" following the enumeration of the aliens to be exempt from registration and service and adding the phrase "and persons in other categories to be specified by the President."

Neither the Selective Training and Service Act of 1940, under which the Selective Service System operated until it expired on March 31, 1947, nor the Selective Service Regulations contained provisions, either as originally enacted or as amended, for the exemption of any alien by reason of a treaty provision. This Act provided a way for the exemption of aliens who are subjects, nationals or citizens of neutral countries and all citizens of neutral countries were treated in the same way in the application of the Selective Service Law regardless of whether or not the alien's neutral country had a treaty with the United States relating to military service of its subjects while in the United States.

The Department of State transmitted from time to time communications from foreign embassies and legations of cobelligerent and

neutral countries to National Headquarters of the Selective Service System requesting that an alien be relieved from military obligations by reasons of the provisions of a treaty.

Selective Service never considered the alien's right to exemption to rest on the fact that he was a treaty alien but considered the status of his country in the war, as to whether it was a co-belligerent, neutral, or enemy nation. However, if the alien was a subject of a neutral country with which the United States had a treaty providing for military exemption, his local board through the Director of Selective Service for the State in which the local board was located was informed by a form letter (Form Letter No. 12, copy attached) that a claim had been made for his exemption under the terms of a treaty, and that as a *neutral alien* he was entitled to file an Application by Alien for Relief from Military Service (Form 301).

Selective Service advised the Department of State by form letter (Form Letter No. 11, copy attached) that the alien's local board was being instructed to inform him that he might obtain from his embassy or legation an Application by Alien for Relief from Military Service (Form 301, Revised).

The original Form 301 referred to in Form Letter No. 12 as the "old Form 301 (16–26414–1)" was approved December 31, 1941. This Form 301, which was printed on one page, contained a statement near the center of the page and above the place for the registrant's signature, which had to be attested before a notary public, as follows: "I understand that the making of this ap-

plication to be relieved from such liability will debar me from becoming a citizen of the United States."

Because of the objections of some neutral aliens to having this statement above their attested signature, this form was revised on March 16, 1943, to eliminate the statement. Instead there was added near the bottom of the form (Form 301, Revised) below the place for the alien registrant's signature the provision in Section 3 (a) of the Act that a neutral alien who requested relief from military service would be debarred from future citizenship.

The deletion from the original form above referred to was not considered by Selective Service to constitute a recognition of any special right in a treaty alien. It was always the position of the Selective Service System that the signing of either the original or revised Form 301 clearly brought the alien within the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended December 20, 1941. Every Form 301 signed by a neutral alien was processed in the same manner and the original thereof was sent to the Immigration and Naturalization Service of the Department of Justice as evidence that the particular alien had secured an exemption from liability from military training and service solely by reasons of the provisions of Section 3 (a) of the Act.

Due to a mistake in proposing the revision of this form, it was first printed without the statement of the law at the bottom. This mistake was discovered shortly after the revised version was

returned to Selective Service Headquarters by the printer and, so far as can now be recalled, this version was never used since it was not considered fair to the alien to let him sign a form that carried no notice or reference to the fact that such action would debar him from future citizenship in the United States.

The Revised Form 301 approved and used by Selective Service carried the statement of the law and this is the Revised Form 301 referred to in both Form Letters Nos. 11 and 12 to be used by all neutral aliens who desired to sign it. The old Form 301 had been printed in quantity and all local boards had a supply of these forms. For economical reasons only a small number of the revised form was issued and it was to be used only in those cases in which the neutral alien requested it until the supply of the old form was exhausted. However, any neutral alien could use the revised Form 301, whether or not his country had a treaty with the United States.

Selective Service took the position that the type of form used by the neutral alien to apply for relief from military service was immaterial, just so it was the form prescribed by the President, as the law was clear and unequivocal that such action would debar the alien from future citizenship in the United States.

No agreement, either written or verbal was ever made by Selective Service with the Department of State or any foreign embassy or legation to recognize treaty rights relative to military service or to give any different or preferred treatment to the nationals of any country by reason

of the fact that a treaty existed. All aliens of neutral countries were treated the same under similar circumstances in accordance with the provisions of the Selective Training and Service Act of 1940, as amended, and the regulations prescribe for its administration.

Sincerely yours,

LEWIS B. HERSHEY,
Director.

(Form Letter No. 11)

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, NW.
Washington 25, D. C.

The Honorable
The SECRETARY OF STATE

Subject: (Registrant's Name)
Local Board No.
(Address)
Your reference:

MY DEAR MR. SECRETARY: Reference is made to your letter of (Date), regarding the above-named registrant.

We are instructing his local board to inform him that he may obtain from the (Embassy or Legation) an Application by Alien for Relief from Military Service (Form 301, Revised), which form has previously been approved by you.

Sincerely yours,

DIRECTOR.

931169—51——8

(Form Letter No. 12)

NATIONAL HEADQUARTERS

SELECTIVE SERVICE SYSTEM

21ST AND C STREETS NW.

Washington 25, D. C.

State Director of Selective Service
(Address)

Subject: (Registrant's Name)
Local Board No.
(Address)

DEAR ———: The above-named registrant claims exemption from service in our armed forces under the terms of a treaty between the United States and (Country) of which latter country he states he is a national. As a neutral alien he is entitled to file an Application by Alien for Relief from Military Service (Form 301).

He may obtain an old Form 301 (16–26414–1) from the local board, or he may obtain a revised Form 301 (16–33666–1) from the (Embassy or Legation) for execution and filing by him with the local board.

Until the supply on hand is exhausted the old Form 301 may be used by the local boards in accordance with section 622.43 of the Regulations. However, if a special request is made by a registrant for a revised Form 301, he may secure it by application either to his Embassy or Legation,

or to National Headquarters through his local board.

For the Director,

(Officer's Name)
(Rank)
Foreign Liaison Section,
Manpower Division.

SS:MJB

D. J. File No.
38-52-0

FEBRUARY 1, 1951.

ADRIAN FISCHER, ESQ.
Legal Adviser,
Department of State,
Washington 25, D. C.

DEAR MR. FISHER: The Supreme Court has requested that in *Moser* v. *United States,* October Term 1950, No. 301, we bring to the Court's attention the records of the preparatory work available in the Department of State concerning the negotiations leading to the execution of the Convention of Friendship, etc. between the United States and the Swiss Confederation, concluded November 25, 1950 and proclaimed November 9, 1855, and that we advise the Court (1) whether the United States has similar treaties in addition to those with Spain (33 Stat. 2105, 2108), Costa Rica (10 Stat. 916, 921), Argentina (10 Stat. 1005, 1009), and Paraguay (12 Stat. 1091) and (2) what the practice was under the Selective Training and Service Act in dealing with citizens of countries with whom the United States had such treaties.

Mr. Bishop, of the Department of Justice, has been furnished some copies of file materials by your Mr. Yingling, and a copy of a letter to counsel for the petitioner, summarizing some of the facts. But this material, of course, does not represent a definitive statement of the record at the Department of State. We would accord-

ingly appreciate a full statement of the record and copies of file materials pertinent to the above questions, with the understanding that such statement and copies, and the copies heretofore furnished to Mr. Bishop, may be included in the brief to the Court, to the extent deemed relevant.

Sincerely yours,

PHILIP B. PERLMAN,
Solicitor General.

In reply refer to
L/EUR 711.5511-F/1-551

DEPARTMENT OF STATE,
Washington, February 19, 1951.

The HON. PHILIP B. PERLMAN,
Solicitor General.

MY DEAR MR. SOLICITOR GENERAL: This is in reply to your letter of February 1, 1951, requesting certain information for which the Supreme Court asked in *Moser* v. *United States,* October Term, 1950, No. 301.

Request for exemption from military service under the Selective Training and Service Act of 1940 concerned for the most part nationals of Switzerland, although there were some exemptions claimed for Costa Ricans and Spaniards. The practice was for the Mission (Embassy or Legation) in Washington of the country concerned to address an informal note to the Secretary of State requesting the exemption, under pertinent treaty provisions, of one or more of its nationals registered for Selective Service. It was the practice of the Swiss Legation to claim the exemption only in behalf of non-declarant Swiss citizens, although there was no such distinction in the applicable treaty. Costa Rica claimed exemption for both declarants and non-declarants.

On the receipt from a Mission of a request for exemption, the Department of State would address a letter to General Hershey, Director of Selective Service, advising him of the request and stating the Department's view that under the treaty in question the alien was exempted from military service. The Director was asked to ad-

vise the Department of the result of his investigation of the case or cases referred to in the Mission's note and of the action taken thereon in order that the Mission might be informed. Subsequently, General Hershey would inform the Department that the registrant's local board was being directed to instruct him to apply to the Mission for a revised Selective Service Form 301 which had previously been approved by the Department of State and which each such registrant was required to execute and file with his local board. Thereupon the Department would inform the Mission that the Director of Selective Service had directed the registrant's local board to instruct the registrant to apply to the Mission for a DSS Form 301 to be executed and filed with his local board. Supplies of the revised DSS Form 301 were furnished to the Mission by the Director of Selective Service through the Department of State.

The revised DSS Form 301 was used only by aliens claiming exemption under a treaty. The original DSS Form 301 which was an application for relief from military service to be signed by the neutral alien contained the statement "I understand that the making of this application to be relieved from such liability (for military service) will debar me from becoming a citizen of the United States." It was the position of the Swiss Legation that its citizens were entitled under the treaty to unconditional exemption from military service and that they should not, therefore, be debarred from becoming citizens of the United States for claiming the treaty right. In order that the applicant for exemption under the treaty

might not be compromised in any future claim to American citizenship by having signed an application containing the statement quoted above, the Department and the Selective Service System agreed upon a revised form to be used by persons claiming exemption under a treaty, which form omitted the indicated statement. Thus, the alien was left free to assert his claim in the courts that he was not barred from becoming a citizen for having claimed his treaty right. The Department has on different occasions orally advised representatives of the Swiss Legation that only the courts could definitely decide whether the barring provisions of the Selective Training and Service Act were applicable to aliens entitled to exemption from military service by treaty.

In addition to treaties similar to the Swiss treaty, heretofore brought to your attention, additional treaties providing for service by declarants remaining in residence in the country in event of a war with a third power, are in existence with respect to Honduras, 45 Stat. 2618; El Salvador, 46 Stat. 2817; Norway, 47 Stat. 2135, 2139; Estonia, 44 Stat. 2379; Germany, 44 Stat. 2132; Hungary, 44 Stat. 2441; Latvia, 45 Stat. 2641; Liberia, 54 Stat. 1739; and Austria, 47 Stat. 1876.

We enclose copies of various letters and memoranda that may be considered with the foregoing summary.

Sincerely yours,

For the Secretary of State:

ADRIAN S. FISHER,
The Legal Adviser.

(Copy to Mr. Wasserman)

[List of enclosures omitted in printing.]

JANUARY 22, 1951.

In reply refer to
L/EUR 711.5511-F/1-551

Mr. JACK WASSERMAN,
Counsellor at Law,
WARNER BUILDING, WASHINGTON 4, D. C.

MY DEAR MR. WASSERMAN: I have received your letter of January 5, 1951, concerning the case of *Moser* v. *the United States* in which certiorari has been granted by the Supreme Court of the United States. You request the Department's assistance in obtaining the following material and information requested by the Court in connection with the case:

(1) Preparatory work concerning the negotiations leading up to the conclusion of the Treaty of Friendship, Commerce and Navigation of 1850 between the United States and Switzerland;

(2) Names of countries other than Switzerland with which this country has treaties containing provisions for reciprocal exemption from military service; and

(3) The practice under the Selective Training and Service Act of 1940 in dealing with citizens of countries with which the United States had treaties similar to the Swiss treaty.

With respect to the Court's first request, you are advised that the records of the negotiations leading up to the conclusion of the Treaty of Friendship, Commerce and Navigation of 1850

between the United States and Switzerland are to be found in the National Archives and that you may arrange to examine them by consulting Mrs. Carroll, Room 5 E, Foreign Affairs Section, National Archives. There is also considerable material regarding the negotiation of this treaty in Hunter Miller's *Treaties and Other International Acts of the United States of America* (U. S. Government Printing Office, 1937).

In respect to the Court's second inquiry, you are advised that this Government has concluded treaties containing provisions regarding military service similar to that contained in the Swiss treaty with the following countries: Argentina, China, Costa Rica, Ireland, Italy, Paraguay, Thailand, Spain, and Yugoslavia. The treaties with China, Ireland, and Italy were concluded subsequent to the enactment of the Selective Training and Service Act of 1940.

In response to the third question raised by the Court, the Department desires to point out that a procedure was worked out between it and Selective Service whereby the Embassy or Legation of the country of which an alien was a national would transmit to the Department an application for the alien's exemption on the basis of the treaty with that country. If the Department was satisfied that the treaty was applicable and approved the application, it would transmit such application to National Selective Service Headquarters, with the statement that it had been approved. The latter would thereupon notify Selective Service Headquarters of the particular state in which the alien was registered and the state headquarters would in turn notify the

alien's local board. The same procedure was followed with respect to nationals of the other countries with which treaties had been concluded as was followed in the case of Swiss nationals. However, it does not appear that the treaty provisions were invoked by all the countries concerned.

Sincerely yours,

RAYMUND T. YINGLING,
Assistant Legal Adviser.

MARCH 21, 1946.

VD:

Swiss citizens in the United States are exempted from military service under the provision of Article II of the Convention of Friendship, Commerce and Extradition of November 25, 1850. This exemption was claimed by the Swiss Legation in behalf of many Swiss citizens during the war. The Selective Service System refused to acknowledge the right to the exemption on treaty grounds but granted the exemption under the provisions of Section 3 (a) of the Selective Service Act. The Department admitted the treaty right to exemption and requests of the Legation for the exemption were forwarded to the Selective Service System. In order that Swiss citizens might claim the exemption and reserve their position as to the effect of Section 3 (a) of the Selective Service Act on their right to become citizens, Form 301 was revised by the Selective Service System to its present form in which the alien merely claims exemption from military service without indicating the basis of the claim. At the bottom of the form below the applicant's signature the pertinent provisions of Section 3 (a) of the Selective Service Act are quoted.

The Swiss Legation has been informed on numerous occasions by the Department that the effect of a claim to exemption from military service on the Swiss citizen's right to become an American citizen can only be determined definitively by the courts. In order that the Consul

at Zurich may have a complete picture of the situation it is suggested that he should be informed of the foregoing facts. No opinion is expressed as to the right of a Swiss citizen who filed a Form 301 in the above circumstances to admission into the United States as an immigrant.

Le: RTYingling:hr
811.111 Lavanchy, Paul J.

SEPTEMBER 27, 1949.

In reply refer to
L/M 811.2222F/9-1649

MR. A. R. MACKEY,
Acting Commissioner,
IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE.

MY DEAR MR. MACKEY: The Department has received your letter of September 16, 1949 (Reference: A–4906863) stating that you have under consideration the question of instituting appellate proceedings from the judgment of the United States District Court for the Eastern District of New York admitting to citizenship one Paul Moser, a former national of Switzerland, who executed an application for exemption from military service (Form DSS 301) which was granted. You refer further to certain representations made by Mr. Moser's counsel to the court concerning the Form DSS 301 executed by aliens who were entitled to exemption from military service by treaty and you request any information concerning the matter which the Department may be able to furnish.

Under the provisions of Article II of the Convention of Friendship, Commerce and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service. In view of these treaty provisions, Swiss nationals felt that they should not be penalized for claiming their treaty rights by being debarred from becoming citizens of the United States and

were reluctant to sign Form DSS 301 which contained the printed statement that:

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States.

Representatives of the Swiss Legation were advised informally by representatives of the Department that the right of a Swiss national who claimed and was granted exemption from military service during the war could only be decided definitively by the courts, but in order that the Swiss national's case would not be prejudiced by signing a DSS Form 301 containing the above-quoted statement, the Selective Service System permitted Swiss nationals and other aliens in a similar position to sign a revised DSS Form 301 prepared in accordance with informal understandings with the Department of State, which revised form omitted the quoted statement and substituted therefor:

> I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

However, the revised form 301 quoted Section 3 (a) of the Selective Training and Service Act of 1940, as amended, beneath the signature of the applicant for relief from military service.

It is hoped that the above explanation will clarify the situation and will enable the Department of Justice to decide what position it should take in the Moser case. The Director of Selective Service can, no doubt, furnish copies of the forms referred to above.

Sincerely yours,

For the Secretary of State:

RAYMUND T. YINGLING,
Assistant Legal Adviser.

L:L/M:RTYingling:bd
9/26/49

LEGATION DE SUISSE,
Washington, D. C.

The Minister of Switzerland presents his compliments to the Honorable the Secretary of State and with further reference to the Secretary's note of July 6, 1942, concerning the liability of Swiss nationals for military service in the United States, has the honor to submit the following additional cases of non-declarant Swiss citizens for unconditional release from the liability for military service, in conformity with Article II of the Treaty of Friendship, Commerce and Extradition of November 25, 1850:

1. *Max G. Mueller,*
   Address: 405 East 54th Street, New York City.
   Order number 11580,
   Local Board: No. 40, 139 East 57th Street, New York City.
2. *Robert M. Syz,*
   Address: 310 East 44th Street, New York City.
   Order number 2462,
   Local Board: Room 1004, 231 Madison Avenue, New York City.
3. *Robert Knittel,*
   Address: Wavertree Hall, Greenwood, Va.
   Order number 695–A,
   Local Board: No. 31, 67 East 59th Street, New York City.
4. *Walter Wisler,*
   Address: (old) Ritz Tower, Park Avenue at 57th St., New York City.

931169—51——9

(new) Brazilian Court Hotel
Brazilian Ave. at Hibiscus, Palm Beach, Fla.

Order number 2821,
Local Board: No. 31, 67 East 59th St., New York City.

DEPARTMENT OF STATE,
Washington.

NEW YORK CITY.

5. *Gilbert Vasserot,*
Address: 823 Seneca Street, Seattle, Wash.
Order number 3747,
Local Board: No. 260, 136–50 Roosevelt Ave., Flushing, N. Y.

6. *Xavier J. Rust,*
Address: 126 Midland Avenue, Syracuse, N. Y.
Order number 2269,
Local Board: No. 258, College Point, L. I., N. Y.

7. *Arthur Weibel,*
Address: 25 Bronson Avenue, Scarsdale, N. Y.
Order number 12017,
Local Board: No. 743, Scarsdale, N. Y.

8. *Erich A. Fischer,*
Address: 60 Beaver Street, Room 1206, New York, N. Y.
Order number 3433–A,
Local Board: No. 9, 2227 M Street NW., Washington, D. C.

9. *George Henri Thorel,*
Address: 601 North Isabel Street, Glendale, Cal.
Order number 334,
Local Board: No. 181, 2313 Honolulu Ave., Montrose, Cal.

10. *Eligio Tunzi,*
    Address: P. O. Greenfield, Cal.
    Order number 883,
    Local Board: No. 121, City Hall, King City, Cal.
11. *Amatore (Armando) Lotti,*
    Address: 629 18th Street, Oakland, Cal.
    Order number 47,
    Local Board: No. 72, Townhall, Park Avenue, Emeryville, Cal.
12. *Armand Cosandey,*
    Address: 304 N. Main Street, Galax, Va.
    Order number 2602,
    Local Board: No. 1, 3010 Kahl Building, Davenport, Iowa.

The required letters of the above registrants to the Director, Selective Service System, in which they request to be unconditionally relieved of the liability for military service under the provisions of Article II of the Treaty of 1850, are herewith enclosed.

The Minister would appreciate being informed of the final disposition of these cases.

Mr. Kurt R. Schneider, whose case was submitted with note of October 15th, informed the Legation that in order not to be inducted into the United States Armed Forces, he had in the meantime been required by his Local Board (No. 242, 6233 Hollywood Boulevard, Hollywood, California) to file Selective Service Form 301 "Application by Alien for Relief from Military Service", which exempted him from the obligation for military service, with the consequence, however, that he will be debarred forever from becoming an American citizen.

The Minister would appreciate it if the Secretary would ask the competent authority to have this form returned to Mr. Schneider.

12 Enclosures.

WASHINGTON, D. C., *November 11, 1942.*

NOVEMBER 23, 1942.

In reply refer to
Le 811.2222 (1940)/2116

Maj. Gen. LEWIS B. HERSHEY,
Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I am enclosing a copy of a note of November 11, 1942, and its enclosures, from the Legation of Switzerland claiming the exemption from military service under the provisions of the Selective Training and Service Act of 1940 of certain persons listed therein who are said to be non-declarant aliens of Swiss nationality.

The Department has previously expressed the view that under the provisions of Article II of the Treaty of Friendship, Commerce, and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service. I shall appreciate being advised of the result of your investigation of the cases referred to in the Legation's note and of the action taken thereon in order that the Legation may be informed.

Sincerely yours,

For the Secretary of State:

GREEN H. HACKWORTH,
Legal Adviser.

Enclosures:
From Legation of Switzerland,
November 11, 1942, with
enclosures.

Le: RTY: MMM: SS
11/17/42

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and acknowledges the receipt of his note of November 11, 1942 containing an additional list of non-declarant Swiss nationals for whom exemption from military service is claimed.

The cases have been referred to the appropriate agency of the Government for investigation and upon the receipt of a report thereon the Secretary of State will again communicate with the Minister.

DEPARTMENT OF STATE,
Washington, November 23, 1942.

811.2222 (1940)/2116
Le: RTY: MMM: SS 11/17/42

(A30)

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and refers to his note of November 11, 1942, containing a list of non-declarant Swiss nationals for whom exemption from military service was claimed.

The Secretary of State is now advised by the Director of Selective Service, to whom the cases were referred for investigation, that the respective local boards of the registrants listed in the Legation's note are being directed to instruct the registrants to apply to the Legation for a DSS form 301 which each registrant is required to execute and file with his local board.

DEPARTMENT OF STATE,
Washington, April 9, 1943.

811.2222 (1940)/2116
Le:RTY:HJG:SS
4/6/43

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N.W.
Washington, D. C.

MARCH 5, 1943.

In replying address
The Director of Selective Service
and refer to No.
9-2.23-97

The Honorable
The SECRETARY OF STATE

Subject: Emil Digglemann
Max Jakob Ackermann
Werner Paul Kuoni
Carlos Riggenbach
Robert Torner
Emil Thut
Leonhard Wuest
Hans Sarbach
Augusto Adeglio Scattini
Achille Carlo Tamagni
Beat William Buol

MY DEAR MR. SECRETARY: Further reference is made to your letter of September 11, 1942 (Your reference: Le 811.2222 (1940)/1560), transmitting a copy of a note dated September 5, 1942, and its enclosures from the Legation of Switzerland concerning the above registrants who claim to be exempt from military service in the United States by reason of a treaty between the United States and Switzerland.

We are this date returning the files of the above registrants to their local boards for proc-

essing in the normal manner. The previous orders to the local boards staying induction have been rescinded and these registrants have been or will be classified in the same manner as all other registrants. However, inasmuch as these registrants appear to be citizens of a neutral country, they may be relieved from liability for military service in accordance with section 622.43 of the Selective Service Regulations, as amended, if they file with their local boards at any time before they are actually inducted an Application by Alien for Relief from Military Service (Form 301), executed in duplicate.

The Selective Service System is unable to predict the effect that filing such an application might have on a registrant's subsequent petition for naturalization. We have, however, revised Form 301 and section 622.43 of the Selective Service Regulations, omitting any reference to the citizenship debarment provisions of section 3 (a) of the Selective Training and Service Act of 1940, as amended.

There are enclosed several copies of Form 301 which you may wish to forward to the Legation. Should any of the above registrants desire to be relieved from liability for training and service, they should execute such Forms in duplicate and return both copies to their local boards. The local boards are being advised to process these cases in accordance with Selective Service Regulations.

Sincerely yours,

LEWIS B. HERSHEY,
Director.

Enclosures

Budget Bureau No. 33–R046–43
Approval expires January 31, 1944

(LOCAL BOARD DATE STAMP WITH CODE)

APPLICATION BY ALIEN FOR RELIEF FROM MILITARY SERVICE

STATE OF _____ }
COUNTY OF _____ } ss:

I, _____ _____ _____
(First name) (Middle name) (Last name)
do solemnly swear—or affirm—that I am a citizen or subject of _____; I am a registrant of Local Board
(Country)
_____, _____, _____, _____;
(Number) (City) (County) (State)
my alien registration number is _____; I _____
(have) or (have not)
declared my intention to become a citizen of the United States; my declaration of intention to become a citizen of the United States is No. _____, and was filed in the _____ Court at _____, _____, _____,
(City) (County) (State)
on _____, 19____
(Month and day)

I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

Dated this _____ day of _____, 194__

Subscribed and sworn before me this _____ day of _____, 194__

_____
(Signature of registrant)

_____
(Signature of officer)

_____
(Designation of officer)

INSTRUCTIONS

This form should be executed by the registrant in duplicate. The local board will transmit the original to the Director of Selective Service through the State Director of Selective Service and will retain the duplicate in the registrant's Cover Sheet (Form 53). (See section 622.43 (b) of the Selective Service Regulations.)

DSS Form 301 (Revised 1–2–43.)

U. S. Government Printing Office 16—26414–2

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N.W.
Washington, D. C.

MARCH 6, 1943.

In replying address
The Director of Selective Service
and refer to No.
11-3.2-106

The Honorable
The SECRETARY OF STATE

Subject: Hermann Gregoire Rusch
Local Board No. 248
Elmhurst, Long Island
New York

MY DEAR MR. SECRETARY: Reference is made to your letter of February 20, 1943, your reference le 811.2222(1940)/3326, transmitting a copy of a note dated February 9, 1943, and its enclosures from the Legation of Switzerland concerning the above registrant who claims to be exempt from military service in the United States by reason of a treaty between the United States and Switzerland.

We are enclosing two copies of Application by Alien for Relief from Military Service (Form 301, Revised), which we believe is a proper application for relief whether on the basis of a treaty or of the provisions relating to neutrals, section 3 (a) of the Selective Training and Service Act of 1940, as amended. It will be noted that the revised form makes no reference to the fact

that the applicant will be debarred from becoming a citizen of the United States. The Selective Service System is unable to predict the effect that the filing of such application may have on the registrant's subsequent petition for naturalization.

If the registrant contemplates the filing of such form, he should present the same properly executed to the local board immediately since he will otherwise be classified in the same manner as other registrants.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

Enclosure: 2 copies Form 301, Revised.

Budget Bureau No. 33–R046–43
Approval expires January 31, 1944

(LOCAL BOARD DATE STAMP WITH CODE)

APPLICATION BY ALIEN FOR RELIEF FROM MILITARY SERVICE

STATE OF _____
COUNTY OF _____ } ss:

I, _____ _____ _____
(First name) (Middle name) (Last name)
do solemnly swear—or affirm—that I am a citizen or subject of _____ (Country); I am a registrant of Local Board _____ (Number), _____ (City), _____ (County), _____ (State); my alien registration number is _____; I _____ (have) or (have not) declared my intention to become a citizen of the United States; my declaration of intention to become a citizen of the United States is No. _____, and was filed in the _____ Court at _____ (City), _____ (County), _____ (State), on _____ (Month and day), 19____

I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

Dated this _____ day of _____, 194__

Subscribed and sworn before me this _____ day of _____, 194__

_____
(Signature of registrant)

_____
(Signature of officer)

_____
(Designation of officer)

INSTRUCTIONS

This form should be executed by the registrant in duplicate. The local board will transmit the original to the Director of Selective Service through the State Director of Selective Service and will retain the duplicate in the registrant's Cover Sheet (Form 53). (See section 622.43 (b) of the Selective Service Regulations.)

DSS Form 301 (Revised 1–2–43)

U. S. Government Printing Office 16—23414–2

MARCH 24, 1943.

In reply refer to
Le 811.2222 (1940)/3736

Maj. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I have received your letter of March 17, 1943, suggesting that nationals of neutral countries who claim exemption from military service in the United States under the provisions of a treaty, be permitted to sign a revised Form 301 instead of the Application of Alien for Relief from Military Service, Form 301, No. 16–26414–1, previously used. The new Form 301 is a revision of the revised Form 301 of January 2, 1943, No. 16–26414–2. In the new Form 301 it is proposed to add to the revised Form 301 of January 2, 1943, the following words beneath the line designated for the signature of the registrant:

> The Selective Training and Service Act of 1940, as amended, reads in part—"That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

The Department sees no objection to the new revision of Form 301 or to its use in treaty cases. It is noted that no general distribution of the new form is contemplated but that the Department will be furnished with suitable quantities of the form presumably for distribution to missions of neutral countries whose nationals are entitled to exemption from military service under treaty provisions.

Sincerely yours,

For the Secretary of State:

GREEN H. HACKWORTH,
Legal Adviser.

Le:RTY:AY:SS 3/22/43

LEGATION DE SUISSE,

Washington, D. C.

JANUARY 11, 1943.

The Minister of Switzerland presents his compliments to the Honorable the Secretary of State and with further reference to the Secretary's note of July 6, 1942, concerning the liability of Swiss nationals for military service in the United States, has the honor to submit the following additional cases of non-declarant Swiss citizens for unconditional release from the liability for military service, in conformity with Article II of the Treaty of Friendship, Commerce and Extradition of November 25, 1850:

1. *Arthur Pieter Rosenstein,*
   Address: 140 Riverside Drive, New York, N. Y.
   Order number: 12211–A
   Local Board: No. 44, 1109 Lexington Avenue, New York, N. Y.
2. *Giulio Monleone,*
   Address: 95 Joralemon Street, Brooklyn, N. Y.
   Order number: 12285
   Local Board: No. 133, 129 Montague Street, Brooklyn, N. Y.
3. *Gerard Henri Demaurex,*
   Address: 307 Produce Exchange, 2 Broadway, New York, N. Y.
   Order number: S1563–B
   Local Board: No. 30, 201 West 89th Street, New York, N. Y.

The required letters of the above registrants to the Director, Selective Service System, in which they request to be unconditionally relieved of the liability for military service under the provisions of Article II of the Treaty of 1850, are herewith enclosed.

Mr. Gerard Henri Demaurex, named above under number 3, has further informed the Legation that in order not to be inducted into the United States armed forces he had already been required by his Local Board to file Selective Service Form 301 "Application by Alien for Relief from Military Service", with the consequence, however, that he will be debarred forever from becoming an American citizen.

The Minister would appreciate it if the Secretary would ask the competent authority to have this form returned to Mr. Demaurex.

3 Enclosures.

WASHINGTON, D. C., *December 31, 1942.*

JANUARY 11, 1943.

In reply refer to
Le 811.2222 (1940)/2692

Maj. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I am enclosing a copy of a note of December 31, 1942 from the Legation of Switzerland and its enclosures claiming the exemption from military service under the Selective Training and Service Act of 1940 of certain persons therein listed who are said to be non-declarant aliens of Swiss nationality.

The Department has previously expressed the view that under the provisions of Article II of the Treaty of Friendship, Commerce, and Extradition, concluded on November 25, 1850 by the United States and Switzerland Swiss nationals in the United States are exempted from military service. I shall appreciate being advised of the result of your investigation of the cases referred to in the Legation's note and of the action taken thereon in order that the Legation may be informed.

Sincerely yours,
For the Secretary of State:
GREEN H. HACKWORTH,
Legal Adviser.

Enclosure:
From Legation of
Switzerland, December 31,
1942 and enclosures.

Le:RTY:MEB:SS 1/6/43

JANUARY 11, 1943.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and acknowledges the receipt of his note of December 31, 1942, and its enclosures requesting the exemption from military service in the United States of certain persons listed therein who are said to be nondeclarant Swiss citizens.

The cases have been referred to the appropriate agency of the Government for investigation and upon the receipt of a report thereon the Secretary of State will communicate with the Minister.

DEPARTMENT OF STATE,
WASHINGTON, *January 11, 1943.*

811.2222(1940)/2692
Le:RTY:MEB:SS 1/6/43

(A43)

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
Washington, D. C.

In replying address
The Director of Selective Service
and Refer to No.
9-3.4-97

The Honorable
The SECRETARY OF STATE

Subject: Gerard Henri Demaurex
Local Board No. 30
New York, New York

MY DEAR MR. SECRETARY: Reference is made to your letter of January 11, 1943 (Your reference: Le 811.2222 (1940)/2692), enclosing a copy of a note dated December 31, 1942, from the legation of Switzerland in which it was claimed that several registrants who are citizens of Switzerland are exempt from military service in the United States by reason of a treaty between the United States and Switzerland. The name of the above registrant was listed in the note and a letter to the Director of Selective Service from the registrant was also enclosed. It was explained in the note and letter that the registrant had previously filed an Application by Alien for Relief from Military Service (Form 301). Apparently, the registrant now desires to withdraw or revoke the Form 301 and claim exemption under the treaty.

Under the Selective Service Regulations, Forms 301 are sent from local boards to this office and

from here transmitted to the Immigration and Naturalization Service, Philadelphia, Pennsylvania. Our records indicate that the one executed by this subject was transmitted to the Immigration and Naturalization Service on November 20, 1942.

On prior occasions we have been advised by the Immigration and Naturalization Service, and we concur in the opinion, that there is no provision in the Selective Service law authorizing the revocation or withdrawal of a Form 301 after it has been filed. It appears, therefore, that the proper action to be taken is to make the Legation's note and the registrant's letter a part of the registrant's file with the Immigration and Naturalization Service so that such can be given consideration when and if the registrant files a petition for naturalization.

A copy of this letter together with a copy of the Legation's note and the registrant's letter is being sent to the Immigration and Naturalization Service.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and refers to his note of December 31, 1942, requesting the exemption from military service of certain Swiss citizens. With reference to Gerard Henri Demaurex it was stated that he had filed with his local board Selective Service Form 301 and the request was made that this form be returned to him.

The Secretary of State is now advised by the Selective Service authorities as follows concerning Mr. Demaurex:

> Under the Selective Service Regulations, Forms 301 are sent from local boards to this office and from here transmitted to the Immigration and Naturalization Service, Philadelphia, Pennsylvania. Our records indicate that the one executed by this subject was transmitted to the Immigration and Naturalization Service on November 20, 1942.
>
> On prior occasions we have been advised by the Immigration and Naturalization Service, and we concur in the opinion, that there is no provision in the Selective Service law authorizing the revocation or withdrawal of a Form 301 after it has been filed. It appears, therefore, that the proper action to be taken is to make the Legation's note and the registrant's letter a part of the registrant's file with the Immigration and Naturalization Service so that such can be given consideration when and if the registrant files a petition for naturalization.

A copy of this letter together with a copy of the Legation's note and the registrant's letter is being sent to the Immigration and Naturalization Service.

DEPARTMENT OF STATE,

Washington, March 31, 1943

811.2222(1940)/3779
Le:RTY:JBA:SS
3/29/43

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET N. W.
Washington, D. C.

11–4.8–106

DIRECTOR OF SELECTIVE SERVICE FOR
NEW YORK CITY,
1 East 44th Street,
New York, N. Y.

Subject: Jean-Pierre Fatzer
Order No. 12308
Local Board No. 44
New York, New York

DEAR COLONEL MCDERMOTT: The above subject claims the right to exemption from service in our armed forces under the terms of a treaty between the United States and the Government of Switzerland, of which country he claims to be a national.

His file is returned herewith, and you are requested to instruct the local board to inform the subject that his application for relief from military service must be made on his behalf by the Embassy of his government, through our State Department. A revised Form 301, issued under the Regulations in accordance with section 3 (a) of the Selective Training and Service Act of 1940, as amended, will be given to the subject by the Embassy of his government for execution and proper filing by him with the local board.

It is to be noted that the above applies only to those neutrals claiming exemption by virtue of a treaty. Form 301, now in your possession, may be used by the local boards in accordance with section 622.43 of the Regulations, for execution by all those neutrals not claiming exemption by virtue of a treaty.

For The Director,

ROBERT B. COONS,
Lieutenant Colonel, AUS,
Assistant Chief, Manpower Division.

Enclosure

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
Washington, D. C.

APRIL 10, 1943.

The Honorable
The SECRETARY OF STATE

Subject: Rights of Treaty Aliens
Your Reference Le 811.2222
(1940)/3425

MY DEAR MR. SECRETARY:

This is in reply to your letter of February 27, relating to the right of the following registrants to relief from military service in our armed forces, by virtue of a treaty between this Government and the Republic of Switzerland:

Jean-Pierre Fatzer
Arthur Job
Peter Staeger

The respective local boards of the first two registrants above listed are being directed to instruct them to apply to the Legation of Switzerland for DSS Forms 301, heretofore approved by the Department of State, which each registrant is required to execute and file with the local board in which he is registered. Copies of our letters to the State Directors are enclosed herewith.

Peter Staeger has heretofore filed a Form 301 and is therefore relieved from liability for service.

Sincerely yours,

[S] LEWIS B. HERSHEY,
Director.

Enclosures

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

AMERICAN LEGATION,
Bern, June 30, 1943

No. 5470

Subject: Transmitting text of statement by Federal Councillor Pilet-Golaz on June 9, 1943, concerning liability of Swiss citizens in United States to perform military service.

The Honorable
The SECRETARY OF STATE,
Washington.

SIR: I have the honor to transmit herewith the text and translation of a statement by Federal Councillor Pilet-Golaz, Chief of the Federal Political Department, answering a question in Parliament concerning liability to American military service of Swiss citizens resident in the United States.

M. Pilet-Golaz's explanatory statement before the Council of State on June 9 was made in connection with parliamentary consideration of the annual report of the Federal Political Department for 1942. Copies of the latter, which had referred to representations by the Swiss Government in regard to the recruitment of citizens of Switzerland in the United States for service in the armed forces of the United States, were

transmitted to the Department with my despatch No. 4947 of May 5, 1943.

An Italian radio broadcast on June 10 referred to the Swiss Foreign Minister's statement and sharply criticized the treatment of Swiss nationals in the United States: M. Bonna, Chief of the Division of Foreign Affairs of the Federal Political Department, has made a point of bringing to my attention the text of the stenographic record of M. Pilet-Golaz's remarks on this subject, and in a conversation on June 10 with Mr. Huddle, Counselor of the Legation, he stated that the Italian radio broadcast had grossly misrepresented the statement by M. Pilet-Golaz and that he (M. Bonna) desired that there should be no misunderstanding on the part of the American Government regarding the position of M. Pilet-Golaz in this matter.

Respectfully yours,

(S) Leland Harrison,
LELAND HARRISON.

Enclosures:-
Text of statement by
M. Pilet-Golaz;
Translation.

File No. 800
DFB/mk
In quintuplicate to Department

(Enclosure to despatch No. 5470, June 30, 1943)

TRANSLATION

Council of States, Session of June 9, 1943.

M. PILET-GOLAZ, *Federal Councillor:*

This being said, I come to the question which was put to me by the Ways and Means Commission of your Council which concerns the obligation for Swiss citizens having acquired the American nationality to perform a period of military instruction and also to serve in time of war in the American army.

I believe the question is based on the Commission's own information. Had I been advised earlier, I could have pointed out to it that the situation is not quite as described.

The discussions which we are having at present with the United States do not essentially concern individuals having dual nationality. In their case, the situation is unfortunately very clear, if not always very agreeable. It is the fate of dual-nationals, in time of war, to be considered by each country of which they are citizens, and in such country, as nationals and not as foreigners. In a country whose nationality one has acquired—it is an undisputed principle—one cannot claim another nationality. A Swiss in Switzerland is Swiss; a Frenchman in France is only French; an American in America is only American. You will find no exception to this conception or in the application of this rule. Consequently the Swiss-Americans who live in the United States are con-

sidered by the American Government as Americans just as the Americans who live in Switzerland are considered by us as Swiss. I repeat that this is not only true as concerns the United States but it applies to all countries which recognize dual nationality. From a legal viewpoint, there is no possible discussion on that point. As a matter of fact, there have always been arrangements, accommodations or facilities granted, and the negotiations concern the importance and the extent of those accommodations and facilities.

The United States have even gone further in this matter and here is where the problem becomes difficult. A law adopted on December 20, 1941—several weeks after the entry of the United States into the war—extends compulsory military service to all foreigners established in the United States, not only to those having double nationality and who are American citizens, but to all foreigners, even neutrals. Foreigners may, however, be exempted from this obligation by registering a declaration to the effect that they have no intention of acquiring, and definitely renounce any intention of acquiring, American nationality. For example, a Swiss residing in the United States who, in compliance with the law of December 20, 1941, has been drafted, could say, under this law: "I am not American, I do not wish American nationality and I renounce any intention of acquiring it." It goes without saying that Swiss who have lived for a long time in the United States and who probably expect to continue their career there do not gladly make such a declaration. That law put them in an

extremely difficult dilemma and that is the reason why we have taken up the matter. Up to now, our negotiations have achieved the following result: Swiss who are established in the United States are no longer required to make a declaration renouncing the nationality, but merely a declaration according to which they do not intend to do military service in the United States. At once, they are liberated and exempted from the draft. We hoped that the assurance given us by the Government of the United States would have a general character, in other words that it might apply automatically to all Swiss citizens, whereas what was granted to us was only applicable in individual cases: each Swiss established over there must make a request to receive the benefit of the provisions of the law in question.

We are continuing our efforts in order to obtain, if possible, that this facility be given a general instead of an individual and casual character.

Since I have approached this problem, I will add that we have similar difficulties with Canada. In the fall of 1942, Canada, although much later than the United States, adopted a similar law and our efforts in that country aim at obtaining a situation at least equal to that which we have been able to settle with the United States of America.

Those are the explanations which I am able to give the Council on that question.

In reply refer to
Le 811.2222(1940) Moser, Paul

FEBRUARY 4, 1944.

Maj. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I am enclosing a copy of a note of January 27, 1944 from the Legation of Switzerland and its enclosure claiming the exemption from military service under the provisions of the Selective Training and Service Act of 1940 of Paul Moser, who is said to be a non-declarant alien of Swiss nationality.

The Department has previously expressed the view that under the provisions of Article II of the Convention of Friendship, Commerce and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service. I shall appreciate being advised of the result of your investigation of the case referred to in the Legation's note and of the action taken thereon in order that the Legation may be informed.

Sincerely yours,
For the Secretary of State:

GREEN H. HACKWORTH,
Legal Adviser.

Enclosure:
From Legation of Switzerland,
January 27, 1944, with enclosure.

Le:RTY:FHH:SS
2/3/44

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, NW.
Washington 25, D. C.

FEBRUARY 12, 1944.

The Honorable
The SECRETARY OF STATE

Subject: Paul Moser
Local Board No. 14
New York, New York
Your Reference: Le 811.2222
(1940)

MY DEAR MR. SECRETARY: Reference is made to your letter of February 4, 1944 regarding the above-named registrant.

We are instructing his local board to inform him that he may obtain from the Legation of Switzerland an Application by Alien for Relief from Military Service (Form 301, Revised), which form has previously been approved by you.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and has the honor to refer to his note of January 27, 1944 requesting the exemption from military service of Paul Moser, a Swiss national.

The Secretary of State is now advised by the Director of Selective Service to whom the case was referred for investigation that the registrant's local board has been instructed to inform him that he may obtain from the Legation an Application by Alien for Relief from Military Service, DSS Form 301, which each such registrant is required to execute and file with his local board.

DEPARTMENT OF STATE,
Washington, February 25, 1944.

811.2222(1940) Moser, Paul
Le:RTY:FHH:SS
2/24/44

931169—51——12

DEPARTMENT OF STATE

MEMORANDUM OF CONVERSATION

DATE: 11/19/43.

Subject: Right of Costa Ricans in the United States to exemption from military service.

Participants: Colonel Dargusch, Colonel Shattuck, Lieut. Colonel Glen Parker, Captain Lewis, Selective Service System, Mr. Yingling, Le.

Copies to:

In view of General Hershey's letter of October 29, 1943 indicating the intention of the selective service authorities to treat Costa Rican cases on the same basis as other alien registrants in spite of their claims to exemptions on treaty grounds, I asked for an opportunity to discuss the matter with Selective Service authorities.

At the conference in Colonel Dargusch's office I stated that it is the Department's desire to carry out the treaty obligation of this Government that a satisfactory solution had been arrived at in the cases of neutral aliens in spite of the divergent views of the Department and the Selective Service System on the legal questions involved, and that I hoped that it would not be necessary to dishonor our treaty obligations to Costa Rica in order to obtain the services of some dozen Costa Ricans in whose behalf the Costa Rican Government has claimed exemption from military service on treaty grounds. I pointed out that under the

Selective Service Law, the President can exempt from registration and service additional categories of persons than those specifically exempted and that under Selective Service regulations the Director of Selective Service is also authorized to exempt from registration and service, individuals or categories of persons. The Selective Service officials present were appreciative of the Department's problem but did not feel that the President's power should be exercised to exempt a few Costa Ricans since the exemption would have to be in general terms and might result in exempting other aliens who are entitled to such exemption on treaty grounds but have not claimed it. They did not feel that the Director's power of exemption could be exercised in cases of persons who in their view are liable for service under the Selective Service law.

I asked whether the Costa Ricans who have claimed exemption on treaty grounds have been given physical examinations to determine their fitness for military service. Colonel Parker indicated that this had not been done, and I suggested that such examination might eliminate some of the cases from further consideration by their local boards if it were found that the persons concerned were unfit for service. It was agreed that appropriate instruction should be issued to have the persons referred to given preinduction physical examinations with the caution that they were not to be inducted until further instructions from the Director of Selective Service. It was further agreed to suggest, informally, to the War Department, the rejection of those

Costa Ricans entitled to exemption on treaty grounds who cannot be rejected on physical grounds as the War Department can reject any person not acceptable to it for military service. This whole procedure is to be carried out informally, and it is hoped thereby to dispose of the small number of cases involved in a manner satisfactory both to the Department and the Selective Service System.

811.2222(1940)/5152
Le: RTYingling; MET: IIG: SS
11/19/20/43

FEBRUARY 11, 1944.

In reply refer to
Le 811.2222(1940)—Malavasi, Carlos

The Hon. FRANK KNOX,
Secretary of the Navy.

MY DEAR MR. SECRETARY: As you are aware the Selective Training and Service Act of 1940, as amended, makes every male citizen of the United States and every other male person residing in the United States who is within certain specified ages, liable for training and service in the land or naval forces of the United States.

This Government is a party to certain treaties with foreign governments which contain provisions exempting the nationals of such foreign governments from military service in the United States and granting exemption to American citizens from military service on a reciprocal basis.

For some time the Department has been receiving from foreign missions in this country requests for the exemption of their nationals from military service under such treaty provisions. The requests have been transmitted to the Director of Selective Service who, when they have been received in time, has taken steps to stay induction. In some cases, however, the requests are received too late to stay induction or relate to people who have already been inducted.

The Department has been advised by the Director of Selective Service that Carlos Malavassi a Costa Rican citizen was inducted on December 13, 1943 and the Costa Rican Embassy states that he is at present serving in the United States

Navy and is assigned to Company 1024 at Camp Waldron, United States Naval Training Station, Farragut, Idaho. The Ambassador of Costa Rica has requested the exemption from military service of Mr. Malavassi under the provisions of Article IX of the Treaty of Friendship, Commerce and Navigation concluded by the United States and Costa Rica on July 10, 1851.

For your information Article IX provides in part as follows:

> The citizens of the United States residing in the Republic of Costa Rica, and the citizens of the Republic of Costa Rica residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, * * *.

The Department considers that Mr. Malavassi is exempted from military service in the United States under these treaty provisions. I shall appreciate being advised whether he may be discharged from service in the Navy.

Sincerely yours,

EDWARD R. STETTINIUS, Jr.,
Acting Secretary.

Le: RTY: FHH: SS
2/5/44

FEBRUARY 17, 1944.

In reply refer to Le

The Hon. HENRY L. STIMPSON,
Secretary of War.

MY DEAR MR. SECRETARY: The Ambassador of Costa Rica has requested the exemption from military service under the provisions of the Selective Training and Service Act of 1940 of a small number of Costa Ricans residing in the United States. The requests were referred to the Director of Selective Service and the Department is now informally advised that after pre-induction physical examinations of such persons the following have been classified as indicated and will be processed for induction:

José Gonzalez—Local Board No. 103—Class 1-A,
Carlos Cruz—Local Board No. 26—Class 1-A,
Carlos Pattoni—Local Board No. 35—Class 1-A-L, and
Ralph Vieto—Local Board No. 27—Class 1-A-L, all of New York City.

The Department considers that Costa Ricans in the United States are exempted from military service under Article IX of the Treaty of Friendship, Commerce and Navigation concluded by the United States and Costa Rica on July 10, 1851, which provides in part as follows:

> The citizens of the United States residing in the Republic of Costa Rica, and the citizens of the Republic of Costa Rica

> residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, * * *.

The Department will appreciate your cooperation in carrying out the treaty obligations of this Government in the cases referred to above.

Sincerely yours,

EDWARD R. STETTINIUS, Jr.,
Acting Secretary.

Le:RTY:FHH:EH:SS 2/10–11/44

MAY 6, 1944.

UNRESTRICTED

No. 518

EDWARD G. TRUEBLOOD, ESQ.,
American Chargé d'Affaires ad interim,
San José.

SIR: Your attention is called to the following situation concerning military service of Costa Rican nationals residing in the United States:

The Costa Rican Embassy has from time to time requested the exemption of Costa Rican nationals from military service under the provisions of Article IX of the Treaty of Friendship, Commerce and Navigation concluded by the United States and Costa Rica on July 10, 1851. The Director of Selective Service has now informed the Department that he cannot agree that Costa Rican nationals are entitled to exemption from military service under the treaty, that the conflict between the provisions of the treaty and the Selective Service law is a matter that has engaged the careful attention of Selective Service authorities for some time, and that they have not been able to arrive at any conclusion which would permit them to exempt the nationals of Costa Rica from military service. In these circumstances, and before determining what further action should be taken, the matter was discussed informally with the Costa Rican Embassy here. The Embassy was informed that the Department would like to be advised whether, in

view of its cobelligerency, Costa Rica still desires to invoke the treaty provisions referred to above in behalf of Costa Ricans residing in the United States. In this connection it was pointed out that other cobelligerents do not object to the service of their nationals in the armed forces of the United States, but that with most of such cobelligerents military service agreements have been concluded under the terms of which their nationals, who are called for military service in this country, have the opportunity to elect to serve in the armed forces of their own country.

The Embassy was further informed that the Department would also like to be advised whether in the event Costa Rica intends to continue to invoke the treaty provisions referred to in behalf of its nationals, it will do so in the cases of Costa Ricans who have declared their intention to become American citizens. In this connection it was stated that the Department felt that the Costa Rican Government would perhaps not desire to interest itself in behalf of such persons, since they have taken up a permanent residence in the United States and have taken steps to acquire American citizenship. It was pointed out that one of the neutral countries whose nationals are exempted from military service in the United States under treaty provisions voluntarily indicated to the Department that it did not intend to invoke the treaty in behalf of declarants, and its practice has conformed to that policy. Should the Department request the President to specify other categories of persons in addition to those specified in the

Selective Service Act as exempt from liability for registration and service, its request would have to be confined to persons who are not citizens of the United States, and who have not declared their intention to become citizens of the United States as the President is not empowered by the Act to exempt citizens or declarants.

The above is furnished for your information and as a basis for informal discussions with the Foreign Office should you consider such action desirable. It should be borne in mind throughout that the Department is only desirous of ascertaining the attitude of the Cost Rican Government on the questions raised. The Department considers that the treaty is in effect and has raised no question concerning the right of Costa Ricans in the United States to exemption from military service under the provisions thereof.

Very truly yours,

For the Secretary of State:

G. HOWLAND SHAW.

Le:RTY: CSS 5/3/44

OCTOBER 9, 1944.

UNPESTRICTED

No. 704

S. WALTER WASHINGTON, ESQ.,
American Chargé d'Affaires ad interim, San José.

SIR: The Department refers to your despatch no. 1691 of July 26, 1944, in reply to its instruction no. 518 of May 6, 1944, concerning military service of Costa Rican nationals residing in the United States.

The Ambassador of Costa Rica recently called at the Department to discuss this matter and stated that he had received from the Foreign Office his Government's reply to our request for advice as to whether Costa Rica intended to continue to invoke the treaty provisions exempting its nationals in the United States from military service and if so whether it intended to include declarants. He was told that the Department had received the reply from the Embassy and in response to his request for the Department's comments on the proposals therein, he was informed that while the Department appreciated the desire of his Government to cooperate in working out an arrangement for the disposal of these cases it was felt that the proposals were impracticable of adoption by Selective Service and that since the Costa Rican Government still intended to request exemption of its nationals who entered the United States prior to March 29, 1943, the problem of obtaining such exemp-

tion in view of the position of the Selective Service authorities concerning the treaty remained unsolved. The Ambassador was advised that if his Government could see its way clear not to request the exemption of declarant Costa Ricans we could probably obtain the exemption of other Costa Ricans by Presidential action. The Ambassador stated that he would explore that possibility further and let us know. Nothing further has been heard concerning the matter up to this time.

The Department has since requested the President to designate treaty aliens as exempt from military service in the United States as is provided for in Section 5 (a) of the Selective Service Act and he has complied with the request. Since the President is prohibited by the Act from exempting American citizens and persons who have declared their intention to become such his action will not result in the exemption from military service of Costa Ricans who have declared their intention to become American citizens.

Very truly yours,

For the Secretary of State:

G. HOWLAND SHAW.

811.2222(1940)/7-2644
Le:BTY:LSV 10-3-44

RESTRICTED

AUGUST 18, 1944.

No. 468

RICHARD FORD, ESQ.,
American Chargé d'Affaires ad interim,
Tehran.

SIR: The Department has received your despatch no. 1033 dated July 21, 1944 enclosing a copy in translation of a note verbale of July 15, 1944 from the Ministry of Foreign Affairs concerning the liability of Iranian subjects to military service in the United States.

The Ministry refers to the fact that Iranian nationals in the United States are being called for military service and requests their exemption from such service in view of paragraph 2 of the provisional agreement between the United States and Persia effected by an exchange of notes dated May 14, 1928, since American nationals are not required to perform military service in Iran.

The pertinent provisions of section 2 of the agreement are that:

> After May 10, 1928, Persian nationals in the United States, its territories and possessions, shall, on a basis of complete reciprocity, be received and treated in accordance with the requirements and practices of generally recognized international law.

Under these provisions it is immaterial whether American nationals are drafted by Iran unless

under generally recognized international law the United States is prohibited from drafting Iranians. This Government does not admit that it is prohibited by international law from drafting aliens residing here.

Under the provisions of the Selective Training and Service Act of 1940, as amended, all male non-citizens within specified ages residing in the United States are made liable for military service unless specifically exempted therefrom. Thus Iranian nationals residing in the United States are made liable for military service here. Even though such persons had heretofore been exempted from such service under the provisions of the agreement of May 14, 1928 such provisions would now be ineffective to exempt them from such service in view of the understanding set out in the penultimate paragraph of Minister Philip's note of that date to the effect that "should the Government of the United States be prevented by future action of its legislature from carrying out the terms of these stipulations the obligations thereof shall thereupon lapse."

You will please reply to the Ministry of Foreign Affairs in accordance with the foregoing.

Very truly yours,

For the Secretary of State:

G. HOWLAND SHAW.

811.2222(1940)/7–2144
Le:RTY:REH:BG:SS 8/10 8/14 ME PR

MEMORANDUM

In view of the request contained in the Swiss Legation's Aide-Memoire of November 1, 1945, the Department has given consideration to the question of the effect which H. R. 390 (Act of October 29, 1945—Public Law 205—79th Congress—Chapter 437—1st Session) will have upon the cases of Swiss citizens, desiring to enter the United States, who claimed exemption from military training and service in the Armed Forces of the United States under the Treaty of Friendship and Commerce of 1850, concluded between the United States and Switzerland, and who pursuant to Section 3 (a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845), applied for relief from training and service in the Armed Forces of the United States as citizens of a neutral country.

The Act of October 29, 1945, amends Section 28 (c) of the Immigration Act of 1944 so as to delete from the provisions of that section those enumerated statutes either repealed or superseded by more recent legislation, and to include within the definition of the term "ineligible to citizenship" those citizens or subjects of neutral countries who, by having filed applications for exemption from military training and service in the Armed Forces of the United States in the manner prescribed by Section 3 (a) of the Selective Training and Service Act of 1940, as amended, rendered themselves ineligible to citizenship.

Section 13 (c) of the Immigration Act of 1924, as amended, reads as follows:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d) and is accompanying or following to join him, (3) is not an immigrant as defined in Section 3, * * *.

In the administration of the Act of October 29, 1945, in the light of the provisions of Section 13 (c) of the Immigration Act of 1924, as amended, it appears that no immigration visa may be issued an alien who has applied for relief from military training and service pursuant to Section 3 (a) of the Selective Training and Service Act of 1940, as amended, unless such alien's case falls within one of the categories which Section 13 (c) provides may be admitted.

The categories of aliens "ineligible to citizenship" which Section 13 (c) provides may be admitted into the United States are (1) nonimmigrants of all types, (2) an immigrant previously lawfully admitted into the United States for permanent residence who is returning from a temporary visit abroad, (3) an alien who can qualify under the provisions of Section 4 (d) of the Immigration Act of 1924 as a minister or professor or the wife or unmarried minor child, under eighteen years of age, of such person who is accompanying or following to join him and,

931169—51——13

(4) a bona fide student who can qualify as such under the provisions of Section 4 (e) of the Immigration Act of 1924.

It is to be noted that none of the legislation mentioned above in any manner deprives Swiss citizens of the privileges or exemptions enjoyed under the Treaty of Friendship and Commerce concluded between the United States and Switzerland in 1850, including that provision of the Treaty to the effect that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service." While Swiss citizens are exempt from military service, there is no provision in the Treaty relating to the qualifications of nationals of one of the countries to become citizens of the other. Naturalization questions are outside the purpose and purview of the Treaty.

DEPARTMENT OF STATE,
Washington, November 28, 194

(COPIES: FHM)
(COMPARED: /s/ GER)

THE WHITE HOUSE,
Washington, 16 August 1946.

Memorandum for the ACTING SECRETARY OF STATE:

There has been considerable correspondence regarding the matter of citizens of countries with whom we have bilateral treaties relative to their liability for military service. The President has not had time to go into the various fine details of the argument, but his position is as follows:

He is of the opinion that now that direct participation in war has ceased, the aliens of the four or five countries with which we have bilateral treaties residing in the United States should be excused from Selective Service. He feels that this would make for good feeling and that the number of men that would be lost to military service would be infinitesimal. He also, however, is of the strong opinion that anyone excused from military service by virtue of these agreements, both during the war and after, should be forever excluded from attaining citizenship.

In this matter he is very definite in his opinion, and he has directed that I convey it to you.

(S) HARRY H. VAUGHAN,
Major General, U. S. Army,
Military Aide to the President.

The Hon. DEAN ACHESON,
Acting Secretary of State,
Department of State, Washington, D. C.

(Dictated but not signed before departure August 16)
(COPIED: FHM)
(COMPARED: /s/ GER)

DEPARTMENT OF STATE

WASHINGTON

MAY 22, 1948

In reply refer to
L/E

The Hon. CHAN GURNEY,
Chairman,
Armed Services Committee,
United States Senate.

MY DEAR SENATOR GURNEY: Reference is made to the provisions of section 4 (a) of S. 2655, recently reported by the Armed Services Committee, relating to the liability of aliens to military service.

It has long been the policy of the United States Government to provide for the exemption of certain aliens from military service. In view especially of the desirability of assuring exemption from forced service in foreign armies for representatives of American business and other United States citizens abroad, exemptions from military service applicable to both contracting parties have been incorporated, in one form or another, in numerous commercial treaties during the past hundred years. Moreover, some exemptions for aliens have been included in the United States military service legislation during the two world wars of this country. Since the close of actual hostilities in world war II, two commercial treaties containing such exemptions have been signed, one with China in 1946 and one with Italy in 1948, both of which are now being considered by the Senate Committee on Foreign Relations.

As is indicated in the attached memorandum comparing the exemptions from military service provided for aliens in treaties and legislation of the United States, in both world war I and world war II the failure of the military service legislation to provide exemptions as broad as those contained in certain treaties led to the embarrassment of diplomatic representations by the countries with which the treaties had been concluded. Although S. 2655 now contains a broad exemption, its subsequent amendment, perhaps very quickly in time of emergency, along the lines of the draft legislation in effect during world war I and world war II would raise similar questions under some of the treaties. Such changes in Congressional policy as to the exemption of aliens from military service make it extremely difficult for this Department to draft such treaty provisions in a manner which will at all times accord with the legislation on the subject.

Therefore, recognizing that it has long been the legislative policy to exempt some aliens from military service and the desirability of utilizing this policy to obtain by treaty for United States citizens the broadest possible exemption from military service abroad, the Department of State considers it desirable to include, in this basic legislation now before the Senate, a general exemption from military service of aliens to the extent that such exemption is required by the provisions of any treaty to which the United States is a party. If such a provision remained part of the military service legislation, it would prevent any conflict with treaty obligations, irrespective of

any changes in the general policy as to the drafting of aliens. The treaty provisions covered would be in formal treaties which are submitted to the Senate for its advice and consent before being put into force.

The proposal contained herein has been discussed with Secretary Forrestal's office, and the substance of this letter has been sent to that office. Because of the urgency of the matter this report has not been cleared with the Bureau of the Budget but a copy is being sent to the Bureau.

Sincerely yours,

For the Secretary of State:

CHARLES E. BOHLEN,
Counselor.

Enclosure: Memorandum.

The policy as to the inclusion of military service provisions in commercial treaties in relation to recent legislation

Basic policy

Among the purposes of treaties of friendship, commerce and navigation are (a) the establishment of a formal basis on which American citizens may freely move about the world in pursuit of their lawful affairs without fear of detention or abuse of their persons, and (b) the building of a legal environment in which interchange of personal skills and knowledge, as well as goods, services, and capital, can thrive. Some guarantee against impressment by the foreign military is one of the elements of the foundation on which this Government's commercial foreign policy is

built. The treaty rule against the conscription of aliens is, therefore, directed toward the same objectives as the rules for the protection of persons and property, for the payment of compensation for property taken for public use, and for the humane treatment of persons taken into custody by the police authorities. Moreover, like most provisions inserted in commercial treaties, the provisions must be mutual, giving the same standard of protection to nationals of the other country in the United States as is asked for Americans abroad.

It is particularly important to regard this problem from the viewpoint of Americans abroad. Forced service in certain armies of the world would, in effect, be cruel treatment for American citizens.

The obligation of military service is especially associated with the idea of national loyalty. The American who goes abroad in the interest of American foreign trade, of world economic development, or of international cultural cooperation should not be obliged by any policy of this Government to abandon his primary loyalty to the United States. If foreign governments follow the practice of requiring an oath of allegiance from conscripts (as in the United States, under pain of severe penalties), a policy of allowing Americans to be conscripted abroad might be considered a policy of sanctioning the involuntary expatriation of American citizens. Moreover, it is not believed that the United States should, through a policy of impressment into military service, force nationals of other

countries, similarly attaching loss of nationality to the taking of an oath to the United States, to divest themselves of their nationality.

Pre-World War I Treaties

A number of United States treaties concluded prior to world war I contained broad provisions for exemption from military service without any qualification as to (1) whether or not the nationals of a contracting party claiming exemption under the treaty within the other contracting party had declared their intention to become citizens of such other contracting party or (2) whether or not the two contracting parties were both at war with the same third country. For example, the first paragraph of article II of the treaty of November 25, 1850, with Switzerland provides on this point:

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service, but they shall be liable to the pecuniary or material contributions, which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service. (11 Stat. 589.)

Other governments have protested against the drafting of their nationals as contrary to international law, and under the municipal law of many countries aliens are not now subject to compulsory military service. It is considered important for the United States, which has for many decades followed the practice of including in its commercial treaties provisions as to such

exemption, to continue to include some such provisions, since a decision by the United States to reverse its long-standing policy in this matter might establish an unfortunate precedent with respect to the drafting of aliens which other governments could be expected to follow. However, due largely to the uncertainties as to what exemptions will be provided by future military service legislation, there has not been satisfactory correlation between the exemptions accorded by treaty and those included in legislation.

World War I Draft

The Selective Service Act of 1917, enacted soon after this country became a belligerent in World War I, made liable for military service:

> male citizens, or male persons not alien enemies who have declared their intention to become citizens (Sec. 2, 40 Stat. 77 and 78.)

Thus all aliens who had not declared their intention to become citizens, that is nondeclarants, were exempt, but declarants were subject to service. At that time the United States had treaties with Argentina, Costa Rica, Honduras, Italy, Japan, Paraguay, Serbia, Spain, and Switzerland providing for exemption from military service. Strong representations were received from some governments against the drafting of declarant aliens under this law. The President, as Commander in Chief, provided for the discharge of neutral aliens drafted into the Army contrary to such treaty provisions, but this proved unsatisfactory since the President

could not act until after the treaty had been violated by the induction of the alien. Consequently, at the proposal of the Department of State, the Act was amended in 1918 by the addition of the following proviso:

> *Provided,* That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States. (40 Stat. 885; see also 3 Hackworth Dig. of Int. Law, 602 to 606, especially letter from the Secy. of State to the House Military Affs. Com., Feb. 14, 1918, ibid. 604 and 605.)

Under this amendment neutral declarants also were exempt from military service provided they gave up the privilege of becoming citizens.

Following World War I a number of commercial treaties were concluded containing military service provisions basing exemption upon the absence of a declaration of intention, in language generally comparable to the following in the 1928 treaty with Norway:

ARTICLE VI

> In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military

> service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war. (47 Stat. 2139.)

World War II Draft

The Selective Service Act of 1940, enacted before the United States became a belligerent in World War II, made liable for training and service:

> Every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen. (Sec. 3, 54 Stat. 885.)

This was comparable to the 1917 law before its amendment, and again protests were received from the governments of countries with which the United States had treaties providing for the exemption from military service of aliens, whether or not they had declared their intention of becoming citizens. The Department of State proposed an amendment along the lines of the 1918 amendment to the 1917 Act, permitting declarant aliens to be exempt upon the withdrawal of their declarations of intention. The Congress, a few days after the United States became a belligerent in world war II, amended the 1940 act so as to make subject to training and service:

> every male citizen of the United States, and every other male person residing in

> the United States * * *, *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." (55 Stat. 845; see also letters from the Secy. of State to the Pres. of the Senate and the Speaker of the House, April 15, 1941.)

Thus the basis for exemption was completely changed, and throughout the war an alien was exempt if he was a national of a neutral country rather than of a co-belligerent country.

Recent Treaties

This background of wartime legislation was considered as indicative of the policy of this Government as to the liability of aliens to military service, and for this reason has been used as the basis for the drafting of military service provisions in commercial treaties which have been recently concluded and are now being negotiated.

Provisions along these lines, following the wartime practice of the United States, have been included in the treaty of November 4, 1946 with China (art. XIV) and the treaty of February 2, 1948 with Italy (art. XIII), both of which are now before the Senate, as well as in a number of draft treaties which are in various stages of

negotiation. The provision in the Italian treaty provides:

> 1. The nationals of each High Contracting Party shall be exempt, except as otherwise provided in paragraph 2 of this Article, from compulsory training or service in the armed forces of the other High Contracting Party, and shall also be exempt from all contributions in money or in kind imposed in lieu thereof.
>
> 2. During any period of time when both of the High Contracting Parties are, through armed action in connection with which there is general compulsory service, (a) enforcing measures against the same third country or countries in pursuance of obligations for the maintenance of international peace and security, or (b) concurrently conducting hostilities against the same third country or countries, the exemptions provided in paragraph 1 of this Article shall not apply. However, in such an event the nationals of either High Contracting Party in the territories of the other High Contracting Party, who have not declared their intention to acquire the nationality of such other High Contracting Party, shall be exempt from service in the armed forces of such other High Contracting Party if within a reasonable period of time they elect, in lieu of such service, to enter the armed forces of the High Contracting Party of which they are nationals. In any such situation the High Contracting Parties will make the necessary arrangements for giving effect to the provisions of this paragraph.

CH
OK
FDR

SEPTEMBER 25, 1944.

MEMORANDUM FOR THE PRESIDENT

As you well know, the Selective Training and Service Act of 1940 as amended is, by its terms, applicable to both American citizens and resident aliens.

The United States is a party to a number of bilateral treaties with foreign countries containing provisions exempting nationals of the respective countries from military service in the armed forces of the other. We have such treaties with Spain, Switzerland, Costa Rica and other countries. The treaty with Costa Rica, which is indicative of the general nature of the provisions in question, provides that citizens of Costa Rica residing in the United States shall be exempted "from all compulsory military service whatsoever, either by sea or by land".

Section 3 (a) of the Selective Service Act, as amended by the Act approved December 20, 1941, contains a provision that neutral aliens may be relieved from liability for training and service if, prior to their induction, they make application to be relieved in accordance with rules and regulations prescribed by you, but in the event that they take advantage of this procedure they are to be debarred thereafter from becoming citizens of the United States. We are not having great difficulty with neutral countries although they contend that the

inhibition against becoming citizens is in the nature of a penalty and hence is inconsistent with their treaty rights.

In the case of Costa Rica, a cobelligerent country, a different situation obtains. The Selective Service System takes the position that since Costa Rica is not a neutral, nationals of that country cannot be granted exemption on the grounds of alienage.

The matter has been discussed on different occasions with the Costa Rican Government and with its Ambassador here but they continue to insist upon observance of the treaty.

Section 5 (a) of the Act, as amended, after stating classes of individuals to be exempted, provides for the exemption of "persons in other categories to be specified by the President".

Having in mind the insistence of the Costa Rican Government on the observance of the treaty provisions; also having in mind the rule usually applied in the construction of an Act of Congress that it is never to be supposed to override the provisions of a treaty unless its words are so clear that there is no escape from that conclusion, and our traditional policy relating to the observance of treaties, I am wondering whether you would be willing to direct that this class of persons be exempted from the requirements of the Act.

This exemption could not, under the Act, be made to apply to aliens who have declared their intention to become citizens of the United States. It is not believed that very many people would be affected.

If you desire the exemption to be made, I will so

inform the Selective Service, it being understood that such exemption shall be given only in those cases where the request is made by the foreign government and approved by this Department.

CH

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